APPENDIX

Supreme Court of the United States

October Term, 1973.

No. 73-190.

ISADORE H. BELLIS,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Petition for Certiorari Filed July 27, 1973.

Certiorari Granted October 15, 1973.

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The following are included in the Petition for Certiorari:

APPENDIX.

DOCKET ENTRIES IN U. S. DISTRICT COURT.

May 11, 1973. Motion of Isadore H. Bellis to Quash Subpoena Duces Tecum, filed.

May 11, 1973. Memorandum in support of Motion of Isadore H. Bellis to Quash subpoena Duces Tecum and contra Govt's Motion to Compel the Production of Books and Records, filed.

May 11, 1973. Govt's Memorandum in Re Motion to Compel the Production of Books and Records, filed.

May 9, 1973. HEARING to compel Grand Jury witness to Produce Records, Continued to 5/10/73 at 4 P. M.

May 10, 1973. HEARING RE: Subpoena to produce certain documents

Witnesses Sworn

Order of Court—Mr. Bellis to turn over records to Grand Jury.

May 16, 1973. Memorandum VanArtsdalen, J. and Order that the motion that the Court certify this case for appeal is DENIED and DISMISSED, filed (Dated 5/15/73) 5/16/73 entered and copies mailed.

May 16, 1973. Memorandum Opinion VanArtsdalen, J. in support of bench order issued 5/10/73, filed. 5/16/73 entered and copies mailed.

May 16, 1973. HEARING RE: Govt's Motion for Order of Contempt.

Mr. Bellis held in contempt of Court—Court orders confinement until he supplies information to the Grand Jury or until Grand Jury is Dismissed whichever is sooner.

Mr. Bellis Motion for stay of execution of confinement—GRANTED. BAIL set at $100.00 O. R.

May 16, 1973. Bond in the sum of $100 O. R., filed.

May 17, 1973. Transcripts of Testimony (3 Vols.), filed.

May 21, 1973. Witness Application for Stay of Execution and Release Pending Appeal, filed.

May 21, 1973. NOTICE OF APPEAL OF ISADORE H. BELLIS, A Witness, filed.

May 21, 1973. Copy of Clerk's Notice to U. S. Court of Appeals, filed.

DOCKET ENTRIES IN U. S. COURT OF APPEALS.

June 14, 1973. Copy of Notice of Appeal, rec'd. May 23, 1973, filed.

Record, rec'd. June 11, 1973, filed.

Letter, dated June 12, 1973, from Thomas A. Bergstrom, Esq., U. S. Dept. of Justice, requesting expedited briefing schedule, rec'd. Proof of service in letter.

Order (Clerk) directing that the appeal in this case be docketed and the record filed not later than June 15, 1973; and that counsel for appellant hand file and hand serve legible typewritten brief and the appendix, and counsel for appellee to hand file and hand serve legible typewritten brief, original and 3 copies together with proof of service, not later than June 22, 1973; giving each side leave to file answering briefs, if desired, not later than June 27, 1973, in

legible typewritten form and to be hand filed and hand served; and the Clerk of this court to list this case for disposition on the merits at the earliest convenience of the court, filed.

Appearance of Louis Lipschitz, Esq.; Lipschitz and Danella; and Leonard Sarner, Esq., for appellant, filed.

June 18, 1973. Appearance of Peter F. Vaira and Thomas A. Bergstrom, Esqs. for appellee, U. S. A., filed.

June 22, 1973. Brief for appellant, filed. (4 cc.).

June 22, 1973. Appendix, filed. (4 cc.).

June 22, 1973. Proof of service of appellant's brief and appendix by hand delivery on June 22, 1973 in letter dated June 22, 1973.

June 22, 1973. Brief for appellee, filed. (4 cc.). Certificate of service by mail on June 22, 1973 appears on last page of brief.

June 27, 1973. Reply brief for appellant, filed. (4 cc.). Proof of service by hand delivery on June 27, 1973 in letter dated June 27, 1973.

June 29, 1973. First Supplemental Record (Nos. 12 and 13) rec'd. and filed.

June 29, 1973. Order (*Seitz,* C. J., Gibbons and Hunter) directing that the record in this case shall be supplemented by the forthwith entry by the district court of an order, nunc pro tunc, implementing its finding of civil contempt; when such order is entered it shall be immediately certified to the Court of appeals, filed.

July 2, 1973. CC of above order to C of D. C.

July 2, 1973. Argued. Coram: Seitz, C. J. and Gibbons and Hunter.

July 9, 1973. Opinion of the Court (*Seitz,* C. J., Gibbons and Hunter) filed.

July 9, 1973. Judgment affirming the order of the District Court, filed June 29, 1973 and entered nunc pro tunc as of May 16, 1973. Costs taxed against appellant, filed.

July 9, 1973. Order (*Seitz,* C. J. Gibbons and Hunter) directing pursuant to F. R. App. P. 40(a) that any petition for rehearing which may be filed shall be filed within 4 days after the entry of judgment, filed.

July 12, 1973. Petition by appellant for Rehearing En Banc, filed. (9 copies) service attached.

July 20, 1973. Order (*Seitz,* Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter and Weis) denying appellant's petition for rehearing, filed.

July 23, 1973. Motion by appellant for stay of mandate, filed. (4 cc.). Proof of service attached.

July 23, 1973. Letter dated July 23, 1973 from Leonard Sarner, Esq., counsel for appellant advising Thomas A. Bergstrom, Esq. does not oppose the motion for stay, rec'd.

July 23, 1973. Order (*Seitz,* Gibbons and Hunter) directing that this court's mandate shall issue on July 25, 1973, filed.

July 24, 1973. Order (*Seitz,* Gibbons and Hunter) denying appellant's motion for stay of mandate pending the filing of a petition for certiorari; vacating this Court's order of July 23, 1973, which directed that the mandate of this Court issue in this case on July 25, 1973; and directing that the mandate shall not

issue until August 1, 1973, so that the appellant may have an opportunity to apply to a Justice of the Supreme Court of the United States for a stay of this court's mandate, filed.

August 3, 1973. Notice of filing on July 27, 1973 of petition for writ of certiorari, rec'd from Clerk of Supreme Court, filed. (S. C. No. 73-190).

August 6, 1973. Certified copy of order dated August 1, 1973 (Mr. Justice White) staying the issuance of the mandate of the Third Circuit pending Supreme Court disposition of the petition for writ of certiorari now on file in the Supreme Court; should the petition for certiorari be denied, stay is to terminate automatically; should the petition for certiorari be granted, the stay will remain in effect pending the sending down of the judgment of the Supreme Court of the United States, rec'd from Clerk of Supreme Court, filed. (Supreme Court No. 73-190) (A-146)).

August 1, 1973. Certified copy of appendix and proceedings in this Court forwarded to Clerk of Supreme Court.

August 6, 1973. Order (*Clerk*) directing that the original District Court Record in the above-entitled case be transmitted to the Clerk of the Supreme Court of the United States, filed.

August 6, 1973. Certified copy of above order to C. of S. C.

August 6, 1973. Original District Court record and first supplement in D. C. Misc. No. 73-95, papers 1 thru 13 forwarded to Clerk of Supreme Court.

October 18, 1973. Certified copy of order dated October 15, 1973, rec'd from Clerk of Supreme Court granting petition for writ of certiorari, filed. (S. C. No. 73-190).

SUBPOENA TO PRODUCE DOCUMENT OR OBJECT

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

MISC. No. 71-295

UNITED STATES OF AMERICA

v.

GRAND JURY INVESTIGATION

To Isadore Bellis
709 Medary Aevnue
Philadelphia, Pa.

You are hereby commanded to appear in the United States District Court for the Eastern District of Pennsylvania at Room 209, 928 Market Street in the city of Philadelphia on the 9th day of May 1973 at two o'clock A. M. to testify in the case of United States v. GRAND JURY INVESTIGATION and bring with you all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969.

This subpoena is issued upon application of the United States of America.

April 26, 1973.

ROBERT E. J. CURRAN
Attorney for United States
4042 U. S. Courthouse
Address Philadelphia, Pa.

JOHN J. HARDING,
Clerk.
By B. R. MANTON,
Deputy Clerk.

RETURN

Received this subpoena at Philadelphia, Pa. on 5/1/73 and on 5/1/73 11:30 A. M. at City Council, City Hall, Phila., Pa. served it on the within named by delivering a copy to him.

By JOHN P. COOPER,
Special Agent.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES GRAND JURY

Wednesday, May 9, 1973

Proceedings taken before the United States Grand Jury, in the Grand Jury Room, 928 Market Street, Philadelphia, Pennsylvania, on Wednesday, May 9, 1973, beginning at 1:00 o'clock p.m.

APPEARANCES: THOMAS BERGSTROM, ESQ.

Representing the United States Department of Justice.

The Grand Jury Foreman: You do swear that the evidence you shall give to the Grand Inquest in the matter now pending shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Isadore Bellis: I do.

ISADORE BELLIS, having been duly sworn, was examined and testified as follows:

[2]

Q. Would you please state your name, sir, and spell your last name for the record?

A. Isadore Bellis, B-E-L-L-I-S.

Q. And what is your address?

A. 709 and 711 Medary Avenue.

Q. Is that in the City of Philadelphia?

A. Yes.

Q. Now, Mr. Bellis, are you here today pursuant to a Grand Jury subpoena by this Federal Grand Jury—the people sitting in front of you are the Grand Jurors—are you here today pursuant to a subpoena issued by this Federal Grand Jury to appear before the Grand Jury on the 9th day of May, 1973 at one o'clock p.m. and to bring with you certain records, namely all partnership records currently in your possession for the partnership of Bellis, Colsby and Wolf for the years 1968 and 1969?

A. Such a subpoena was served on me.

Q. And are you here today pursuant to that subpoena, sir?

A. Yes, I am.

Q. Now, Mr. Bellis, have you brought with you the records that the Grand Jury has asked for in the subpoena, specifically as detailed?

[3]

A. I did not on the grounds that under the Constitution of the United States, particularly but not limited to the First, Fourth, Fifth, and Sixth amendments and the Constitution and laws of Pennsylvania, I can not be compelled to be a witness against myself, and the books and records may contain private, testimonial and personal statements and information which might be considered as so doing.

All of which Counsel has advised me and on which advice I rely would give me the right to refuse production of the records and books you referred to or answering any questions in connection with them.

Q. Now, are you represented by Counsel, sir?

A. Yes.

Q. And who are you represented by?

A. Mr. Louis Lipshitz, and assisting him, Mr. Leonard Sarner.

Q. Now, I take it, Mr. Bellis, from your response, although you are unwilling under the First, Fourth, Fifth, and Sixth amendments to the United States Constitution, to produce the documents; I take it from your response that you do have possession of

[4]

those documents?

A. I will not answer that question on the grounds that under the Constitution of the United States, particularly but not limited to the First, Fourth, Fifth, and Sixth amendments, and the Constitution and laws of Pennsylvania, I can not be compelled to be a witness against myself or give evidence against myself, and what you are asking, the response to it may be private, testimonial, and personal in nature, and the information which may be, according to Counsel on which advice I rely gives me the right to refuse production of the records and gives me the right to refuse to answer your question.

Mr. Bergstrom: Now, Madam Forelady, would you please direct Mr. Bellis along with his Counsel, Mr. Lipshitz and Mr. Sarner, to proceed to Courtroom Number 15 on the third floor of the Federal Courthouse where Judge Van Artsdalen is sitting so that we may present to him this matter?

Would you please direct the witness to appear in Courtroom Number 15 on the third floor?

The Grand Jury Foreman: Mr. Bellis,

[5]

I direct you and your attorney to appear at Courtroom Number 15 on the third floor to appear before Judge Van Artsdalen.

Mr. Bergstrom: And we'll do that right now.

(The witness was dismissed for appearance at Courtroom Number 15 at 1:05 p.m.)

This is to certify that the attached proceedings before the United States Grand Jury, at 928 Market Street, Philadelphia, Pennsylvania, on Wednesday, May 9, 1973, were held as herein appears, and that this is the original transcript thereof for the file of the Department.

ALFRED W. KERSHAW,
Court Reporter.

Reported By:
Alfred W. Kershaw

GOVERNMENT'S MEMORANDUM IN RE MOTION TO COMPEL THE PRODUCTION OF BOOKS AND RECORDS.

COMES Now the United States of America by ROBERT E. J. CURRAN, United States Attorney, Eastern District of Pennsylvania, and THOMAS A. BERGSTROM, Special Attorney, United States Department of Justice and moves this honorable court for an order compelling ISADORE H. BELLIS to comply with a federal Grand Jury subpoena and produce certain books and records demanded therein. A copy of said Grand Jury subpoena is attached hereto. In support of its motion the Government respectfully avers as follows:

(1) On April 24, 1973, Mr. ISADORE H. BELLIS was served with a federal Grand Jury subpoena commanding him to appear on May 9, 1973 before said federal Grand Jury and produce certain books and records named in the attached subpoena. On May 9, 1973, Mr. BELLIS appeared before the said Grand Jury and refused to produce those books and records demanded, asserting his privilege against self-incrimination under the Fifth Amendment to the United States Constitution.

(2) In order for this honorable court to determine the issue presented the Government represents the following facts to be controlling:

(a) In approximately September 1969 Mr. ISADORE H. BELLIS terminated his partnership relation with the law firm of Bellis, Kolsby and Wolf, Philadelphia, Pennsylvania, and as of January 1, 1970 the new ongoing partnership of Kolsby and Wolf was formed which continues in existence today. During the years that the law firm of Bellis, Kolsby and Wolf existed and specifically for the years 1968 and 1969 certain books and records were kept and maintained in the offices of Bellis, Kolsby and Wolf.

When Mr. BELLIS terminated his partnership relationship to form the new law partnership of Cohen, Bellis and Verlin, the books and records of Bellis, Kolsby and Wolf remained with the ongoing existing partnership of Kolsby and Wolf.

(b) During April, 1973 a request was made to the law firm of Kolsby and Wolf to examine the partnership records of Bellis, Kolsby and Wolf for the years 1968 and 1969; authorization was given by Mr. Herbert F. Kolsby and Edward L. Wolf on behalf of Kolsby and Wolf for the federal Grand Jury to examine those records. It appears, however, that subsequent to their authorization both Messrs. Kolsby and Wolf realized that all of the partnership records of Bellis, Kolsby and Wolf and specifically those records for the years 1968 and 1969 were removed from their office sometime in late February or early March 1973, at Mr. Bellis' direction. A demand has been made upon Mr. BELLIS by Kolsby and Wolf to return the records, however to no avail.

(c) As of May 2, 1973, the law firm of Kolsby and Wolf continues to authorize the federal Grand Jury to examine the partnership records of Bellis, Kolsby and Wolf for the years 1968 and 1969.

(3) The central issue therefore is whether or not a former partner, to wit ISADORE H. BELLIS, may assert a Fifth Amendment privilege in regard to the production of partnership books and records, wherein the existing partnership, and lawful owner of those records, has specifically waived such privilege. Indeed, whether or not these books and records are the proper subject of a Fifth Amendment assertion at all is questionable in light of the Supreme Court's recent decision in *Couch v. United States*, 93 S. Ct. 611 (1973). In that case petitioner, Couch,

claimed a Fifth Amendment privilege in re certain books and records that had been released to her accountant. The Court held that the Internal Revenue Service could summon a taxpayer's records possessed by an accountant, thereby deciding that there was no accountant-client privilege, however, in addition the court specifically held that the production of these records would not be violative of either the Fourth or Fifth Amendment as there was never an expectation of privacy in these records since the information contained therein would necessarily have to be disclosed on petitioner's Federal income tax returns. The court speaking through Justice Powell stated in regard to this issue,

> "Nor is there justification for such a privilege where records relevant to income tax returns are involved in a criminal investigation or prosecution. In *Boyd,* a pre-income tax case, the Court spoke of protection of privacy, 117 U. S., at 630, but there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return. What information is not disclosed is largely in the accountant's discretion, not petitioner's. Indeed, the accountant himself risks criminal prosecution if he knowingly assists in the preparation of a false return. 26 U. S. C. § 7602(2). His own need for self-protection would often require the right to disclose the information given him. Petitioner seeks extensions of constitutional protections against self-incrimination in the very situation where obligations of disclosure exist and under a system largely dependent upon honest self-reporting even to survive. Accordingly, petitioner here cannot reasonably claim,

either for Fourth or Fifth Amendment purposes, an expectation of protected privacy or confidentiality."

In the case before us, it would certainly seem that there was no expectation of privacy in that the records in question were owned and in the possession of the new partnership from September 1969 until approximately February 1973. After withdrawal by Mr. BELLIS from the old partnership, possession, ownership and expectation of privacy all seem to have been abandoned or relinquished to the new partnership and his (BELLIS') reacquisition of those records in February 1973 was apparently in violation of the rights of the new partnership. In following the theory propounded in *Couch* the original partnership of Bellis, Kolsby and Wolf could have had no real expectation of privacy in these records (partnership receipts for the years 1968 and 1969) as that information was subject to disclosure on Federal income tax returns. However, there is no need to expand *Couch* to its logical conclusions in light of the partnership authorizing disclosure and specifically waiving their privilege.

In *Peelman v. United States,* 247 U. S. 7 (1918), the Supreme Court held the privilege unavailable to a party seeking to suppress the admission of documents and exhibits before a Grand Jury. The court held specifically that the movant's expectation of privacy in the documents had been destroyed by a previous surrender. Such would appear to be the case here, as Mr. BELLIS surrender whatever rights he had to the partnership records when he terminated his existence in the partnership.

The case of *United States v. White,* 322 U. S. 694, 1944 is dispositive of the claim that a mere possessory interest brings papers and documents within the ambit of a witness' Fifth Amendment privilege. However, where,

as here, a third party (to wit: the existing partnership) has a superior right to possession of documents, the witness cannot withhold them. *United States v. Egenberg,* 443 F. 2d 512 (Ca. Third Circuit 1971). In the *Egenberg* case the Third Circuit went on to say:

> "This is the view expressed in the American Law Institute Model Code of Evidence, Rule 206:
>
> > 'No person has a privilege under Rule 203 [self-incrimination] to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control constituting, containing or disclosing matter incriminating him if the judge finds that, by the applicable rules of the substantive law, some other person or a corporation, or other association has a superior right to the possession of the thing ordered to be produced.'
>
> One other group of cases is worthy of note. It has been held that even personal papers must be surrendered to a trustee in bankruptcy by a bankrupt despite the fact that they may incriminate the bankrupt. *Ex parte Fuller,* 262 U. S. 91, 43 S. Ct. 496, 67 L. Ed. 881 (1923). Those personal papers, transferred to the trustee by operation of the substantive law of bankruptcy, may be used against the bankrupt in a criminal case. *Johnson v. United States,* 228 U. S. 457, 33 S. Ct. 572, 57 L. Ed. 919 (1913). This is true despite the fact that the bankrupt may assert the privilege by refusing to testify in a bankruptcy proceeding. *McCarthy v. Arndstein,* 266 U. S. 34, 45 S. Ct. 16, 69 L. Ed. 158 (1924). The bankruptcy trustee's superior right to possession removes even personal papers from the *Boyd* rule.

Thus the *Boyd* rule operates in the narrow area of personal papers to which the witness has the right of possession in a personal capacity. It does not apply to papers of third parties held for a temporary agency purpose."

The *Egenberg* decision has been recently followed by this district in the case of *United States v. Fisher*, 72-2 U. S. T. C. 85, 662 (E. D. Pa. 1972) wherein Judge Davis held, in ordering the production of documents, that where a third party has a superior right to possession of the documents, the witness cannot withhold them. The privilege provided by the Fifth Amendment extends only to personal records. *Boyd v. United States*, 116 U. S. 616 (1886). The following cases support the proposition that the Fifth Amendment privilege does not extend to partnership records which are not personal in nature, and that they may therefore be the proper subject of a summons or subpoena. *In Re Mal Bros. Contracting*, 444 F. 2d 615 (Ca. Third Circuit 1971), *United States v. Silverstein*, 314 F. 2d 789 (Ca. Second Circuit 1963); *United States v. Silverstein*, 237 F. Supp. 446 (S. D. N. Y. 1965); *United States v. Quick*, 336 F. Supp. 744 (E. D. N. Y. 1972). *United States v. Onassis*, 125 F. Supp. 190 (D. C. Dist. of Columbia 1954).

There are two contrary cases in regard to partnership records, however clearly distinguishable from our present situation. In *United States v. Cogan*, 257 F. Supp. 170 (S. D. N. Y. 1966) and *United States v. Slutsky*, 73-1 U. S. T. C. 80, 291 (S. D. N. Y. 1972) the Fifth Amendment privilege was upheld in regard to partnership records. However in both cases it appears that the existing partnership was exercising the privilege in regard to the partnership records and the records sought were personal in nature. Such is clearly not the case here.

In *United States v. Onassis,* 133 F. Supp. 327 (S. D. N. Y. 1955) which deals with a situation where an attempt was made to subpoena partnership records through one partner which would incriminate another partner. The partner who would be incriminated, Augenthalen, was not subpoenaed. The partner who was subpoenaed was given immunity. The Court cited the propositions that a person subpoenaed may not decline to testify or to produce a record in his possession because of possible incrimination of a third person, and that the owner may not raise his privilege against self-incrimination, under the 4th and 5th Amendments, to prevent the production of his private records in the possession of the third person. 133 F. Supp. at 330.

In *Onassis,* all the parties involved were partners in an ongoing concern. The Court said, "Augenthalen, as a partner, has no power to use or suppress these records as his personal property. He has a property interest in them as a tenant in a partnership. He has the right of access to them. That is all. He has no right to exclusive possession." 133 F. Supp. at 331-332.

As the Government maintains in the case in the instant situation, the Court in *Onassis* held that the fact that the records are of a partnership is not of necessity controlling. "They are not his private records." 133 F. Supp. at 332.

Under the law enunciated in *Onassis,* Bellis' partners could have been subpoenaed to produce partnership records over his opposition if they in fact had the records in their custody, however, the records are in Mr. Bellis' custody and perhaps wrongfully so; therefore it does not follow that Bellis should be allowed to assert his 5th Amendment privilege to prevent the production of records, when he perhaps holds them wrongfully and with no prop-

erty interest. His partners have consented to their production, as they are records of a firm which Bellis no longer has a legal interest in. Bellis surely cannot assert an illegal self-help measure as providing him 5th Amendment standing; civilly he might be sued by his partners for conversion or replevin.

In *Sanderson v. Cooke,* 175 N. E. 518 (N. Y. 1931), the leading non-federal case dealing with the books and records of a dissolved partnership, the Court discussed the rights of a former partner in the new partnership. The plaintiff was a former partner of the Defendant's and sought to examine the books of account of the old partnership. The Court stated that the general rule that all partnership books should be kept open to inspection at all reasonable times, even after dissolution, did not necessarily apply in the case before it. "We are not treating here, however, with a partnership in existence, a going concern . . . Whatever may be the property right of a partner in the partnership books, he may transfer and dispose of it like his right to any other bit of property by express, or necessarily implied, agreement." 175 N. E. at 520. The Court stated that where a former partner parted with his interest by sale, he would have no interest in the new partnership, nor in the books.

The Court declared, "there is no law which compels one partner on dissolution to continue the business for the sake of keeping the books and preserving them for the inspection of the other partner." It further stated that the law requires only that partnership books be kept at the principal place of business and be made accessible to partners of a *going* firm, and that there is no duty on the purchaser to keep the books of the prior concern. 175 N. E. at 520. The Court found that the property interest in the assets of the old firm (including the books) passed to the new

firm and that the books, records and files were necessary for the continuance for the new firm. The Court stated of the plaintiff "He knew that the business could not be carried on without all the books, accounts, papers and files of the previous general partnership. He knew, also, that the books of the old firm were not physically closed and laid aside for preservation . . . one book might have the entries of the former general partnership and also the entires of the new limited partnership . . ." and that "when he became a special partner, he ceased to have any interest in the assets, and among the assets of the new limited partnership were the books, records, etc. demanded in this case." 175 N. E. at 521.

The Court further stated, "to transfer the accounts which constituted the business, without the records of the accounts, appears to be meaningless." 175 N. E. at 522. It concluded that the plaintiff has transferred its property interest to the new firm and therefore had no absolute right to examine the books of the firm, be they considered of the "old" or "new." The Court said of the books, "His property interest in them has ceased." 175 N. E. at 522.

The Government maintains that the same situation exists in the instant case. Bellis was once a partner, but in September 1969 withdrew from the partnership. At that time his interest in the new partnership ceased and his property right in its assets and books also ceased. The books and records of the "old" firm were used by the "new" firm. In fact, they were necessary for the business as in *Sanderson, supra.* Thus, Bellis has no right to hold these books as he now does, as they are the property of the new partnership, in which he holds no interest. They are not personal records, but records of business transactions of the firm. While Bellis may be *permitted* to examine them, he has no *right* to do so. Certainly, he has no right to have physical custody or possession of them.

(4) In light of the foregoing, it would appear that Isadore H. Bellis does not have a superior possessory or property right in the books and records in question; that authorization has been given, by the party with that superior right, to examine those books; that they are not the private, personal books and records of Mr. Bellis, and that he has not, nor did he ever have a legitimate expectation of privacy therein. In conclusion, therefore, the Government respectfully urges this Honorable Court to order Isadore H. Bellis to comply with the provisions of the attached Grand Jury subpoena.

Respectfully submitted,

ROBERT E. J. CURRAN
United States Attorney
Eastern District of Pennsylvania
THOMAS A. BERGSTROM
Special Attorney
United States Department of Justice

MOTION TO QUASH SUBPOENA DUCES TECUM.

To the Honorable Donald W. Van Artsdalen, Judge of the United States District Court:

Isadore H. Bellis, by his attorneys, Louis Lipschitz and Leonard Sarner, Esquires move the Court to quash the subpoena duces tecum served upon him in connection with the above matter as follows:

1. Isadore H. Bellis, by Grand Jury Subpoena Duces Tecum addressed to him, was commanded to produce "all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969".

2. On May 9th, 1973, Isadore H. Bellis appeared before the Grand Jury, invoked his privilege against self-incrimination under the 1st, 4th, 5th and 6th Amendments of the Constitution of the United States and the Constitution of Pennsylvania, and did not produce the records.

3. The government has moved for an Order compelling compliance; Isadore H. Bellis resists the motion and asks that the subpoena duces tecum be quashed.

4. Isadore H. Bellis respectfully submits:

A. The privilege which he claims is available to him as a former member of the partnership in question;

B. That the partnership papers that Isadore H. Bellis is alleged to have withheld are his personal and private papers and entitle him to assert his rights under the Constitution of the United States as aforesaid;

C. That these are not impersonal records and may contain private testimonial and personal information disclosure of which may be in violation of his rights as aforesaid;

D. That he has all of the rights of ownership and possession and that no one is authorized to waive any of his personal rights nor does anyone have any rights superior to his.

WHEREFORE, petitioners pray that the Subpoena Duces Tecum served upon Isadore H. Bellis requiring him to produce the partnership records of Bellis, Kolsby & Wolf for the years 1968 and 1969 be quashed.

Respectfully submitted,

LOUIS LIPSCHITZ,
LEONARD SARNER.

MEMORANDUM IN SUPPORT OF MOTION OF ISADORE H. BELLIS TO QUASH SUBPOENA DUCAS TECUM AND CONTRA GOVERNMENT'S MOTION TO COMPEL THE PRODUCTION OF BOOKS AND RECORDS.

Louis Lipschitz, Esquire and Leonard Sarner, Esquire, counsel for Isadore H. Bellis, the above named, file this Memorandum in support of the Motion of Isadore H. Bellis, to quash subpoena ducas tecum and contra the Government's Motion to compel the production of books and records.

1. *The books and records may tend to incriminate Petitioner.*

The books and records of the Bellis, Kolsby & Wolf, law partnership, may contain private and personal statements and declarations which may tend to incriminate Petitioner. They could contain records of receipts which Petitioner authorized to be included therein but which the Government may claim were not included in his tax returns. Likewise, the failure of said books and records to contain a record of a receipt which the Government may claim Petitioner, in fact, received in connection with his law partnership could also tend to incriminate him on a theory that it was omitted from his tax return. Finally, the records could disclose the source of funds received which the Government may claim would be for a purpose in violation of some federal or state or local law.

Accordingly, the Government's reliance on the *Couch* case is entirely misplaced. In the *Couch* case, the books and records were delivered to the taxpayer's account for purposes of preparing his income tax return. It is true that where supporting documents are delivered to an accountant

to aid in the preparation of the tax return, there has been no confidential disclosure whether to an accountant or to an attorney. But, in the instant case, the books and records sought by the Government have in no way been delivered by Petitioner to anyone for purposes of use or disclosure. Under the Government's theory, they remain in the possession of Petitioner and they may contain material completely unrelated to information which would have to be disclosed on Petitioner's federal income tax returns, but which Petitioner desires not to disclose because it may incriminate him. Cf. *U. S. v. Cote,* 456 F. 2d 142 (CA 8, 1972).

2. *The partnership books and records are covered by the privilege.*

The law partnership of Bellis, Kolsby & Wolf consisted of three law partners, one fulltime attorney-employee, occasionally a parttime attorney-employee, a receptionist-telephone clerk and three secretaries. Obviously, it was not the type of impersonal organization akin to a corporation described in the *White, Mal Brothers, Silverstein* and *Onassis* cases relied upon by the Government. Furthermore, the *Quick* case also cited by the Government involve the absence of a showing which is present in the instant case, that the records could be personal enough to incriminate the movant.

On the other hand, the *Cogan* and *Slotsky* cases sought to be distinguished by the Government, clearly involves small personal partnerships such as the one involved in the instant case where the books and records are clearly held to be within the protection of the Fifth Amendment. To these cases may be added *U. S. v. Lawn,* 115 F. Supp. 674 (SD NY 1953) and *U. S. v. Schoendorf,* 454 F. 2d 349 (CA 7, 1971) in which the latter case, it was assumed that if a law partnership did exist between the movant and his

brother and father, the privilege to withhold the books and records of the group would have been upheld.

3. *Dissolution of the Partnership.* The Government's contention that dissolution of the Bellis, Kolsby & Wolf law partnership serves to distinguish the authority of the *Cogan* and *Slotsky* cases or gives added weight to its argument that no privilege exists with respect to the books and records of the former partnership would seem to be completely without merit. In the first place, dissolution is only a technical concept when the parties no longer associate as partners. However, there is a long period of winding up and liquidation and cases are being processed and funds being received on work in progress at the time the parties dissolved the partnership with distribution of funds being made between them on their former partnership basis.

More important, the Government has the argument backwards. It has been argued on behalf of Petitioners that dissolution of a corporation and the transfer of its books to individual stockholders gives the transferees a greater privilege with respect to the former corporate records than existed during the operation of the corporation. This has been rejected. See *Curcio v. U. S.*, 354 U. S. 118 (1957). But it has never been successfully argued that the dissolution gives the transferees any lesser privilege when they now own the books and records more in an individual capacity than before as is true in the instant case. Hence, the Government should get no comfort from the fact that the Bellis, Kolsby & Wolf partnership is allegedly dissolved since this could not take away but only could add to the rights of Petitioner.

4. *The Government's right to stand in the shoes of the other partners in requesting the books and records.*

The Government also seeks comfort in the fact that Messrs. Kolsby and Wolf allegedly have authorized the

Federal Grand Jury to examine the partnership records of the partnership or that these two former law partners have requested Petitioner to turn over the records to them. Whatever may be the rights of Messrs. Kolsby and Wolf vis-à-vis Petitioner, *U. S. v. Cohen,* 388 F. 2d 464 (CA 9, 1967) supplies the short and direct answer. In the *Cohen* case, the Government sought to obtain from the taxpayer workpapers which his accountant had delivered to him. At the request of the Government, the accountant asked that his workpapers be returned. The taxpayer refused and the Court in denying the enforcement of the subpoena, said:

> "It is difficult to see how this conclusion could be affected by the fact that the papers were owned by another who had the right to demand their return. The owner's demand would not involve compulsion by the state, and compliance with it would not incriminate the possessor. The considerations upon which the right depends therefore would not apply, even though the documents might thereafter be obtained by the government from the owner. '[T]he sentiments which bar the *state* from requiring a person to deliver to it a self-incriminating document are logically unrelated to the fact that someone *else,* using methods and for reasons not giving rise to those same sentiments, can require the person to deliver up the document to that someone else.' 8 Wigmore, Evidence § 2259b, at 360 (McNaughton rev. 1961)."

5. *Ownership and possession in Petitioner.*

Finally, unlike any of the cases relied upon by the Government, there is no question that Petitioner is a rightful owner of the books and records sought by the Government and that under the Government's theory, he has pos-

session of them. Hence, we do not have in the instant case, any problems suggested in *Couch* of a division between ownership and possession. Ownership and possession, for purposes of this Motion, must be deemed in Petitioner, no one has a superior possessory or property right in the books and records. They contain the private and personal testimonial declarations and statements of Petitioner which he always had a legitimate expectation of keeping to himself. In fact, as long ago as 1969, the Department of Justice admitted that it had refrained from making the argument that a taxpayer was not protected from production of his own records. See *Steuart v. U. S.*, 416 F. 2d 459 (CA 5, 1969). It is surprising that the Department of Justice now appears to be making the same discarded argument.

It is respectfully submitted that the Motion to Quash should be granted and the Motion of the Government to Compel Production of the Books and Records denied.

Respectfully submitted,

LEONARD SARNER, Esquire,
LOUIS LIPSCHITZ, Esquire,
Attorneys for Isadore H. Bellis.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Miscellaneous
No. 73-95.

IN RE:

GRAND JURY INVESTIGATION
ISADORE H. BELLIS, A WITNESS.

Philadelphia, Pa., May 9, 1973.

Before HON. DONALD W. VAN ARTSDALEN, *J.*

APPEARANCES:

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for Isadore H. Bellis.

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Mr. Bergstrom: Your Honor, we have one other matter.

A witness, Mr. Isadore H. Bellis, was subpoenaed to appear before the Grand Jury at 2:00 P. M. this afternoon. Mr. Bellis showed up early, he showed up at 1:00 o'clock, and Mr. Bellis was served with a Grand Jury subpoena on approximately April 24, 1973, which commanded him to appear before the Grand Jury and to bring with him certain books and records.

Now, for the purposes of this hearing, Your Honor, I would request that Your Honor allow us under Rule 6(e) to break the secrecy of the Grand Jury just for the purposes of this hearing so that I can convey to the Court exactly what took place within the confines of the Grand Jury while Mr. Bellis was present.

There was actually no testimony taken, sir.

The Court: I am wondering whether it is necessary to do that.

Is Mr. Bellis represented by counsel?

Mr. Lipschitz: I and Mr. Sarner represent him, sir.

The Court: All right.

I am wondering whether counsel may be able

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to agree as to what the facts were that took place before the Grand Jury that brings this matter to the Court's attention.

Mr. Lipschitz: I think we probably can, if Your Honor please, without relying on Rule 6(e) to make any disclosures.

I suggest to Your Honor that in spite of what we say here the disclosures are being made of matters which may occur before the Grand Jury.

If Your Honor read yesterday's paper Your Honor would see that one of the newspapers on the front page came out with an article which indicates that they have the very information that Your Honor is trying to keep secret from the public.

The Court: I beg your pardon. I am not trying to——

Mr. Lipschitz: No, I am not saying that Your Honor is trying—that the Government feels obligated to keep secret from the public, and we are just curious to know how the newspapers, we have to rely on the newspapers to get information which normally would come from counsel for the other side and it intrigues us greatly.

The Court: That may be but I don't think that is a matter presently before me.

Mr. Lipschitz: No, if Your Honor please.

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I just got to that point.

Mr. Bergstrom: Your Honor, it would seem to me that we ought to be able to agree that Mr. Bellis himself did appear before the Federal Grand Jury and asserted his privilege under the First, Fourth, Fifth and Sixth Amendments of the United States Constitution, and specifically refused to produce the books and records that the Federal Grand Jury subpoena called for.

Now, concerning this particular hearing, the Government has prepared a memorandum in regard to a Motion To Compel The Production Of Books And Records.

Specifically what the Government is doing today is, we are going to ask Your Honor to compel the production of those books and records which are detailed in the Grand Jury subpoena served on Mr. Bellis on April 24. I have a copy of that subpoena attached to the Government's memorandum which I will present to the Court at this time.

The Court: I am trying to suggest it might be good if I saw what the subpoena is and what it is you are requesting.

(Document handed to the Court.)

As I understand it, the subpoena requests Mr. Bellis to produce all partnership records currently in your possession—which will mean his possession—for the

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partnership of Bellis, Kolsky and Wolf for the years 1968 and 1969; is that correct?

Mr. Bergstrom: Yes, sir.

The Court: And I take it that Mr. Bellis through his counsel, through advice of his counsel, will not produce these.

Mr. Lipschitz: That is correct, sir.

Mr. Bergstrom: Not only will he not produce the records but he would not indicate to us whether or not they were currently in his possession.

Mr. Lipschitz: Yes, that is correct. But, if Your Honor please, may I call Your Honor's attention to the fact that I was just handed this petition about 15 or 20 minutes ago. I don't think that the typing is even dry on it. It consists of some nine and a half pages and when Your Honor examines it Your Honor will come to the realization that a great deal of time and effort went into the preparation of this application which is being made to Your Honor.

In addition to it, if Your Honor please, there are matters which are alleged as factual matters which we claim are not correct.

I have not even had an opportunity to consult with my client to see if there are any additional factual

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matters which are not adequately stated.

I would suggest to Your Honor that we be given an opportunity first to review this application which is being made to Your Honor; secondly, we be given an opportunity to answer; third, be given an opportunity if issues of fact are raised, if Your Honor please, that a hearing be held thereon.

I don't think that Your Honor should summarily on the presentation that is made by the Government in this case make any order. I think it would be unfair to Your Honor.

I think a great deal of research has apparently gone into this legal material which the Government has presented to Your Honor. I think perhaps Your Honor should be equally informed by both sides not only ex parte, sir.

The Court: I note that the subpoena is for the production of certain partnership records of a partnership known as Bellis, Kolsby and Wolf, which I am personally aware of is a law partnership.

Mr. Lipschitz: Yes, sir.

The Court: There is no question in my mind that there is a great deal of doubt as to the extent and the situations under which a law partner may be required

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to reveal partnership records of that law partnership—not only law partnership but it applies to many other partnerships and to other unincorporated associations.

Starting back as early I believe as 1943 in United States vs. White, 322 U. S. 694, there have been a line of cases developed since that time which my very cursory examination of them would seem to indicate that factual issues may be relevant on this matter. And, of course, we have the very recent opinion in United States, I think it is entitled United States vs. Couch——

Mr. Lipschitz: Couch, that is the accountant's privilege of——

The Court: —which raises questions or at least attempts to define the extent of what privilege there may be.

I am presently on trial with a case, I expect to charge that jury this afternoon, I would see no reason why we could not at least delay anything further on this matter until 4:00 o'clock this afternoon.

Mr. Lipschitz: If Your Honor please, at 3:00 o'clock I have to be before Judge Broderick. I was required to come back to a case that I am actually on trial with but that was adjourned until tomorrow morning. I can come back this afternoon as soon as I am finished with Judge Broderick. I don't want to delay anything. At the same

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time, if Your Honor please, I suggest to you that there is no emergency concerning this.

The Court: I don't know whether there is or is not at this time. That may depend on how long the Grand Jury is going to be in session and various other matters; in any event, in a thing of this sort, I think it should be determined always without any undue delay, but affording counsel certainly an opportunity to look into the matter.

I am sure, however, that defense counsel at least has had some basis for looking into the matter since I see two eminent counsel representing Mr. Bellis in this matter, and since I have been advised by counsel that they read something in the newspapers yesterday that would have alerted them to the possible questions.

Mr. Lipschitz: May I assume that I am one of those counsel, if Your Honor please?

The Court: That is correct, sir.

Mr. Lipschitz: That is the finest thing I heard all day long.

The Court: I will request counsel to be back at 4:00 o'clock this afternoon and then we can go into the matter further. I am not indicating that I will necessarily rule on it this afternoon.

Mr. Lipschitz: Yes, sir, we will be back at 4:00 o'clock.

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Mr. Vaira: If I might add something, Your Honor, on the basis of Mr. Lipschitz's attention, I believe an evidentiary hearing would be incumbent upon him to make some sort of a showing what position he is in. I am just pointing out ahead of time that he should be forewarned if he is coming back he should be prepared to put some evidence on to sustain the factual position.

Mr. Lipschitz: If Your Honor please, I don't think we have to sustain the factual position. If Your Honor will look at the bottom of page 2 there is an allegation that Mr. Bellis' former law firm has joined in this. And, if Your Honor please, I think they must establish facts. We would like to speak to these gentlemen. We have not been informed of that.

The Court: We will have to take these matters up again a little later this afternoon.

Are there any other matters that you wish to take up with the Court at this time?

Mr. Bergstrom: No, sir.

The Court: May I ask, I have arbitrarily set 4:00 o'clock this afternoon, will Government's counsel be able to be here at that time?

Mr. Bergstrom: We certainly will be prepared to be back here at 4:00 o'clock. I don't think that there is any great urgency; it could be extended over

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until tomorrow or even Friday. But we are more than willing to be back at 4:00.

The Court: My thought was that if you will be back at 4:00 o'clock this afternoon perhaps we could at least determine what procedure may be appropriate and any time limitations that may be imposed.

Mr. Bergstrom: That is fine. We will be here, sir.

Mr. Sarner: May I say, Your Honor, in connection with the hearing, because Your Honor noted the White case and the line of cases that followed it involved large unincorporated, impersonal partnerships, and, of course, it is going to be our contention that that is not applicable to the smaller three-men law partnership in which we are concerned.

The Court: That does not surprise me that that will be your contention, sir.

Mr. Lipschitz: We would also like to have an opportunity to file a motion to quash this subpoena, if Your

Honor please. We didn't know just what the Government's approach would be, and that may be a matter for Your Honor's consideration. But I suggest we go into that at 4:00 o'clock, sir.

The Court: All right.

Mr. Bergstrom: I would appreciate it, Your

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Honor, if you would direct the Grand Jury to return to the Grand Jury room for further business.

Your Honor, the Grand Jury does not need to return here for this hearing, do they?

The Court: No, there is no necessity for the Grand Jury to be here at all, as I see it.

Members of the Grand Jury, I assume you heard what the special assistant from the Department of Justice said; they request that you return to the Grand Jury room for further consideration.

Members of the Grand Jury, you are excused at this time.

We will take a recess now until 1:30.

(This hearing recessed at 1:34 P. M. and resumed at 4:15 P. M.)

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(Resumed at 4:15 P. M.)

The Court: Gentlemen, perhaps somebody can tell me what the present situation is. Can counsel agree to any extent as to what the present situation may be?

Mr. Lipschitz: If Your Honor please, I wish to submit a motion to quash the subpoena duces tecum to Your Honor

for consideration, and also memorandum in support of the motion to quash the subpoena as well as in opposition to the request made by the Government to compel a production of the records.

I have two copies of the motion to quash the subpoena, rather an original and a copy for Your Honor, the original will go to the Clerk's file. I hand them to Your Honor.

The Court: Have copies been given to all counsel?

Mr. Lipschitz: Yes, if Your Honor please, they have them.

(Documents handed to the Court.)

The Court: The Government has filed a motion to compel production of books and records, setting forth that this subpoena had issued to Mr. Bellis and, as I understand it now, Mr. Lipschitz, you have filed a motion to quash this subpoena.

Mr. Lipschitz: Yes, sir.

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The Court: It seems to me that it will be appropriate to hear you, Mr. Lipschitz, on the motion to quash.

Mr. Lipschitz: If Your Honor please, I don't think that Your Honor can well differentiate between and separate the two applications.

The Court: I think that is true.

Mr. Lipschitz: I think they both are intertwined and they more or less I will say merge in each other.

It is our position that Mr. Bellis is an individual, that the partnership consists of the three individuals, that

the relationship between the parties was a personal one, that there is no artificial entity involved in the establishment of the partnership of Bellis, Kolsby and Wolf. That they did not operate in a fashion, in the same fashion that a large enterprise would operate, that limited partnerships would operate, or a corporation operated. They did not have the large number of employees where the personal personalities were dissipated from the picture.

The Court: Excuse me. I hope not to interrupt counsel too often but novel questions do come to one's mind on this.

Of course, there is nothing on the record as such to establish this at the present time. Do you agree with me on that?

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Mr. Lipschitz: I agree with you except that the Government even in their motion concedes that this partnership consisted of three individuals, and they did not allege in their motion, if Your Honor please, that this was a large operation in the same sense that a limited partnership would operate, or that this was some kind of an organization where individuals were participating in and that this involved a tremendous operation so that it would lose the individual personality of the parties who are concerned.

So I think Your Honor may well take judicial, perhaps judicial notice or take cognizance at least of the fact that this was a partnership consisting of three individuals, that it was a real partnership and not an association of three men.

There is a case which is referred to by the Government in their brief which relates to an association of two or more men, and there the Court found that it was not a real part-

nership. But the Government here first by the designation of the nature of the books has indicated that this is a partnership. The names indicate that this consists of three individuals. The nature of the work, the nature of the kind of work that was done by this partnership was legal. They represented clients, if Your Honor please, fees came from clients and the fees were entered, any fees that were received were entered in books. There isn't anything to the

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contrary, if Your Honor please, and I think the Government will probably concede to Your Honor the facts that I have just referred to.

We have in our motion to quash, if Your Honor please, made certain allegations. It is true that the Government hasn't had an opportunity to dispute or deny them, nor have we had an adequate opportunity to contest some of the allegations which were made by the Government, such as waiver, or a consent to the examination. But it is our position that even if the other partners did consent they could not waive any of Mr. Bellis' rights, any more than Mr. Bellis could waive any of their rights if the situation was reversed.

So it is our claim, if Your Honor please, that we were a former member of a partnership, that the records which the Government wants are personal records, private papers, that they are not held by Mr. Bellis in any representative capacity, that the organization wasn't so large that the individuals were lost in the organization because this is the theory of the philosophy on which large partnerships waive or give up their rights to claim privilege.

The Court: Do you have any case that says that?

Mr. Lipschitz: Yes, sir.

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The Court: I know that some cases talk about the size, and so on, but there are cases that specifically, as I see it, indicate that that really has nothing to do with it, and then they go on to discuss it.

Mr. Lipschitz: Yes, you have the Onassis case which is referred to at 125 Fed. 2d; you have the Lawn case, the Slutsky case—I will give them to Your Honor. You have the Cogan case which is referred to in 257 Fed. 7. There the individual who was summoned to appear before the Grand Jury was designated as custodian of the records, and he was required to produce the books and records of six partnerships.

Even there the Government's request was denied but the Government's position there was asserted to be the fact that this was a large enterprise.

There is Mal Brothers, if Your Honor please, a contracting company, and that is referred to in 444 Fed. 2d, 615, and that is a case which comes from this circuit, an opinion by Judge Ganey.

There they allowed the examination of the books because it was held that the partnership whose books and papers were sought by the Federal Grand Jury had all of the aspects of a corporate enterprise; that they employed 200, 250 people, had a payroll in excess of $1 million, and there was nothing personal or private in connection with

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the papers solicited under the subpoena duces tecum.

I think even the dissenting opinion, if Your Honor, please, in the White case, which is the case that later went up to the Supreme Court, Judge Biggs there differentiated

between a situation where you have a partnership and you have a larger group.

The Court: Of course, one of the problems that I have is that the subpoena at least to me on its face is valid, that is, it is addressed to Isadore Bellis to produce all partnership records in his possession for the partnership of Bellis, Kolsby and Wolf for the years 1968 and 1969.

On its face there is nothing to indicate that Mr. Bellis would have any proprietary interest at all in those particular records, and I think that that is one of the essential elements.

Mr. Lipschitz: If Your Honor please, where a partner is subpoenaed to produce records of the partnership he has privilege, if Your Honor please, unless it is shown that he holds those records in an impersonal fashion, we wanted to protect our position.

The Court: As I understand it, and again this will not appear of record here from the subpoena, but, as I understand it, he is not a member—well, let's put

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it this way: That there is no present partnership of Bellis, Kolsby and Wolf——

Mr. Lipschitz: That is correct.

The Court: —but there were partnership records and such a partnership in 1968 and 1969.

Mr. Lipschitz: Yes, sir.

The Court: It may well be therefore that these records rightfully belong to someone else. In other words, there is nothing to show, as I see it, that he has any proprietary interest in any——

Mr. Lipschitz: If Your Honor please, he has possession and he has, at one time he had one-third ownership of the records, he still has ownership of these records in the absence of any other proof. And I think the burden would shift to the Government that he has no ownership or possession of these records. And that isn't established any place.

The Court: My offhand view is that if there is any privilege here at all that the burden would be upon the one asserting the privilege to establish it. This may be purely a procedural aspect, it really doesn't make any great difference.

Mr. Lipschitz: If Your Honor please, the Government has made certain allegations in their application

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to you. They have asserted that the rights of Mr. Bellis to these records which were owned by the partnership had been given up by him; that because of the permission which they claim they have obtained from the other partnership, Mr. Bellis has now forfeited all of his rights to these records, if Your Honor please.

That can't be so because the other gentlemen who are members of this firm cannot give up or surrender any of the rights that Mr. Bellis has. And there isn't any doubt that he has a right to his records, assuming that these records are in his possession.

The Court: How do you square that with the partnership law of Pennsylvania, a statute, it is in 59 Purdon's Section 51, which provides that partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership and every partner shall at all times have access to and may inspect and copy any of them.

Mr. Lipschitz: If Your Honor please, that only applies to the term of the partnership. This partnership has terminated. The partnership is no longer in existence. And then there is such a thing as a waiver and abandonment of the records to another partner.

The Court: Then wouldn't we be concerned

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with who actually presently had the title to these or the ownership in them, or at least the right of posssession of these particular documents?

Mr. Lipschitz: The Government doesn't have any right of possession in them, if Your Honor please.

The Court: I am not suggesting that.

Mr. Lipschitz: The partners have. The one who has possession of them, the one who has possession of them at this time, Your Honor may assume is Mr. Bellis. You can't deprive Mr. Bellis of his right of possession. The other partners, former partners, can't take it away from him, nor may the Government by obtaining some kind of pseudo assignment of the rights of the other partners deprive Mr. Bellis of that right.

Your Honor will also see that the Couch case which substantially relies and restores the Boyd case, that is referred to at 165 U. S., also explains the situation, that you must have ownership and possession and without possession you can't have these rights, but you must have owership. And there isn't any doubt that nobody has done anything to deprive Mr. Bellis of the ownership of it.

If Your Honor will also examine a case which appears in 380 Fed. 2d, 464, that of the United States vs. Carl Cohen, there the lower court held that the taxpayer

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was entitled to invoke privilege against self-incrimination where a summons to produce his books and records was issued, because he held these records. There he had obtained work papers of the accountant, and the Court there held that he had the absolute right to retain them.

The Court: My law clerk, who has looked up a few things on this, suggests that that case may not be followed in this circuit under 443 Fed. 2d, I think it is at 513, United States vs. Egenberg.

I will be honest with you, I have not read that case yet and I am not completely familiar with it.

Mr. Lipschitz: If Your Honor please, in view of the fact that the Government has made certain allegations of the fact which we think must be established before the Government can be successful in its position, we think that a hearing ought to be held or some evidence ought to be presented by the Government to establish the assertions that they make it their request, and that one of the things which may be significant is waiver, although I doubt it very much. I don't see how anybody can waive somebody else's rights to certain privileges which are afforded them by the Constitution.

The Court: I am inclined to agree that there probably should be a hearing here to establish certain of the facts. Now, as to which side may have the responsibility

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of going forward to present such facts by testimony or evidence, I am not sure.

Mr. Lipschitz: I think Your Honor ought to start with the premise that these are personal books, that we are entitled to their possession, that the Government is not entitled to invade our rights. Now, the Government then asserts that what they rely on is a waiver of those rights, and I think the burden is on the Government to establish a waiver of rights.

The Court: If your position is correct, Mr. Lipschitz, then it would seem to me that at any time that a subpoena is issued to someone asking them to produce certain partnership records that the burden would be on the Government at that point to show that they have the right to have them produced before the Grand Jury, and I am inclined to think that that wouldn't be true unless there were something on the face of the subpoena itself that would indicate that the person subpoenaed did have an interest in the records.

The only thing on this subpoena that would indicate that is that it is addressed to Isadore Bellis and refers to a partnership of Bellis, Kolsby and Wolf.

I can't quite see why that would place the burden on the Government to establish affirmatively that these are records that are not the personal records of Mr.

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Bellis.

Mr. Lipschitz: If Your Honor please, the Government asks Mr. Bellis to produce records, let's assume which he has in his possession.

The Court: All right.

Mr. Lipschitz: Mr. Bellis claims that he is not required to produce them because they belong to him; that these

are records which are not public records, which are not in any way designated to be anything other than private records. At that point that is apparent from the subpoena, from the designation made in the subpoena.

At this point I think the Government must go forward and establish that we are wrong, that these are records which we are not entitled to possess, which we do not own.

The mere fact that these were subpoenaed doesn't establish that. There are certain rights which we claim under the Constitution of Pennsylvania, of the United States.

The Government says we have no right to claim them. If this is the case, if Your Honor please, then in every instance where a subpoena is issued to an individual and he appears in court to testify, he would have to make a complete disclosure of everything contained in those records, or everything to which he could be compelled

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to testify if he were granted immunity in order to retain his right to claim privilege. And it has been held repeatedly by the Supreme Court in the Singleton, in the Hoffman cases that a person does not have to make a complete disclosure, does not have to make a disclosure on how he is going to be hurt in order to preserve his privilege.

Now, if we have to disclose in detail why these records are personal to us and what they do contain, which would hurt us, if Your Honor please——

The Court: I am not suggesting that you would have to show what these records contain in any way.

Mr. Lipschitz: How else can we show that they are personal records, if Your Honor please?

I think the Government would show that they are impersonal records, that we have no right to retain them, that they are not being retained by us in any other way; that they are being retained by us in a representative capacity, and that we have no right to them.

The Court: Suppose we hear the Government for a minute and see what they have to say.

Thank you, Mr. Lipschitz.

Mr. Bergstrom: Your Honor, this is a different situation than might exist if we were asking Mr. Bellis to give testimonial evidence. However, we are not asking for that. We are asking him to produce certain records. He has

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asserted a privilege or a defense to the production of those records under the First, Fourth, Fifth and Sixth Amendments of the United States Constitution. At that point in time it becomes a burden on him, it becomes his burden, an affirmative defense, if you would have, to establish that he in fact has some right in those records which gives him the basis of asserting his privilege under the various constitutional amendments. That is the issue.

And I think if an evidentiary hearing is held it would be incumbent then upon Mr. Bellis to assert what interest he feels he has in those particular records be it proprietary or possessory, when he receives those records, the circumstances under which he receives them, whether he was authorized to take them, whether or not there has been a demand for them, whether or not he has complied with that demand.

The Court: What about the Fifth Amendment rights, how about your right against self-incrimination?

Mr. Bergstrom: At that particular point, Your Honor, he would not be incriminating himself to testimonial to anything. He would be establishing on the record his right to possession and/or proprietary right to the records.

The Court: Suppose a man has to say, well, yes, I have possession of them, but by disclosing that he

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thereby must inferentially disclose that he has, by so doing he incriminates himself by simply admitting the possession.

Mr. Bergstrom: Then I would suggest that he could not go forward with his burden if that were the case. That the burden is still upon him whether or not he can go forward with it or not. If he chooses not to go forward with that burden, that does not change the fact that the burden is still his.

The Court: I am just suggesting this. Suppose Mr. Bellis goes before the Grand Jury and he is asked a question:

> Do you have in your possession records of partners of Bellis, Kolsby and Wolf?

And he refuses to answer on the grounds that it might incriminate him. I don't know whether that will be the situation or not.

Mr. Bergstrom: Well, I think it probably would be.

To be quite frank with the Court, it happened this morning. That exact question was asked and that privilege was asserted.

The Court: Where a question is asked:

Do you have possession of something, and he refuses to answer on the grounds that it may incriminate

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him, under what basis can he be compelled to answer.

Mr. Bergstrom: Well, on the basis, and only on the basis that they are now alleging as a defense that they have possession of the records, and that that possession gives rise to their claim of privilege.

In other words, he is alleging that he has constitutional privileges from releasing or from producing those records, and all I am suggesting is that if an evidentiary hearing is held it is his burden to show how that possessory or proprietary interest arises, and why he has that.

The Court: Suppose by showing how it arises, suppose by showing how the possession arises, he necessarily incriminates himself? Suppose a person is brought before a Grand Jury, they are investigating a gem robbery, and say: Do you have such-and-such diamond that was stolen, and the man says—I mean, they subpoena him to produce it and he refuses, and he says, "It may incriminate me." Where are you in that situation?

Mr. Bergstrom: I don't think the situation is the same here because we are talking——

The Court: I hope that it is not.

Mr. Bergstrom: We are talking about a subpoena for certain records that are in his possession.

The Court: Suppose a person gets possession

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of them illegally?

Mr. Sarner: If Your Honor please, may I interrupt?

If you will read the question, Mr. Bellis did not admit that the books were in his possession. He took the Fifth Anendment on that particular question.

The Court: I have not yet authorized release of anything that took place before the Grand Jury so I will not take note of what occurred before the Grand Jury.

Mr. Sarner: I am sorry.

The Court: I realize that counsel made a statement but I am certainly not considering that.

Mr. Sarner: I mean counsel should be admonished that heshould be accurate at least in what he says to the Court here.

The Court: I am sure that counsel did not intend to be inaccurate in any statement.

Mr. Bergstrom: I certainly do not.

The Court: Go ahead.

Mr. Bergstrom: I have forgotten your question, sir.

The Court: It just seems to me that where a person—ofcourse, if they are claiming privilege of not turning over certain records because they say that those

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records lawfully belong to them, that is one thing. But, if on the other hand they are simply refusing to answer whether or not they have possession by reason of the Fifth Anendment and the right against self-incrimination, I think you may have an entirely different problem.

Mr. Bergstrom: Well, you may well be right. But to short-cut this particular phase of the argument, the Govern-

ment is more than willing, at least at some point in time, if the Court so desires, to produce various testimony taken before the Federal Grand Jury and ask the Court that it would lift the veil of secrecy on that testimony so that the Court could be provided with exactly what was said by various people in regard to these records. That can be done certainly at the Court's pleasure at any time.

But the Government I don't feel is bound at this particular stage to go into a full-blown evidentiary hearing when the burden would seem quite clearly to be, on the subpoena duces tecum, on Mr. Bellis to establish his right in those records and as to whether or not his claim of privilege is valid.

But over and above that, and assuming that the Court desires an evidentiary hearing, the Government is prepared immediately to ask the Court to lift the veil of secrecy on certain Grand Jury testimony and provide that

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to the Court so that the Court will have the facts before it which can determine the issue factually.

The Court: It seems to me, as I read the cases, that there can be facts that make a difference in the ultimate decision, and that being so it seems to me there should be an evidentiary hearing. I understand that the defense in effect agrees with that. I gather that the Government does not seriously dispute it. What we are really arguing about is who has the burden of proof in presenting testimony or evidence in the first instance.

Mr. Bergstrom: But there is even a larger issue here which at least arguably as far as the Government is concerned could be decided without evidentiary hearing.

The case law which is cited not only by the Government but as well by Mr. Bellis is talking in terms of partnerships

that are existing at the time of the summons or subpoena, and they are talking about witnesses who were part of those partnerships at the time of the summons and the subpoena.

We have a situation here that is totally contrary to the vast majority of the case law. We have a very simple case.

The Court: There again, this is a statement that is made by counsel and I have no doubt it is a correct statement, and I think that the defense in effect has at

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least indicated that to some extent, but really there is nothing here of record, that is by sworn testimony or anything else, that establishes that fact.

Mr. Bergstrom: Well, it would seem to me, Your Honor, that if we could agree somehow, either through stipulation or through some form of agreement, that Mr. Bellis left the partnership approximately at the time the Government alleges he left the partnership, and that in the words of Mr. Lipschitz he had a one-third interest in those books and records, certainly the case of the United States vs. Egenberg would be decisive on the issue as two-thirds interest in those records held by Mr. Kolsby and Mr. Wolf who have a superior right to those records, Mr. Bellis therefore cannot claim the privilege.

I think it boils down to a very simple issue, if we can agree upon the fact that when he left and the fact that he did leave, then his interest was one-third interest, at least at that time, we would even dispute although it seems that it would not be necessary to dispute, but the Government would even dispute at this point in time whether or not he even has a one-third interest, but if that is the defense's position, if that is Mr. Lipschitz's position, that he has a one-third interest, certainly the case can be readily decided

upon fact that Mr. Kolsby and Mr. Wolf had the remaining two-thirds interest, therefore,

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their possessory and proprietary rights——

The Court: If that fact can be established.

Mr. Bergstrom: As I understand Mr. Lipschitz's argument a few moments ago he conceded that.

The Court: I don't know that he did. As I say, I have no doubt that these are probably correct facts but it does seem to me that where a person is claiming Fifth Amendment rights that it might be incumbent upon the Government to establish that those rights do not exist or are in some way waived—I won't say don't exist, obviously they always exist.

Mr. Vaira: Your Honor, would I be out of order if I made a remark at this time?

The Court: No, Mr. Vaira.

Mr. Vaira: In a subpoena duces tecum, when a person receives a subpoena duces tecum and comes into the Grand Jury he cannot stand mute; he must say either I have them or I do not. He just can't sit there and say, I have taken the Fifth Amendment. Once he says that, then he may take the Fifth Amendment as to where they are or why he won't produce them. But the whole system of Grand Jury subpoenas would break down if someone who is served with a Grand Jury subpoena duces tecum said nothing. He has to say, I do have them or I don't have them.

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The Court: You may be perfectly right about that, Mr. Vaira. I would appreciate any cases that you may have on that point.

Mr. Vaira: Yes, sir.

Mr. Bergstrom: Your Honor, the Government is prepared to do this. We are prepared to accept for the sake of the record, we are prepared to accept the burden and we are prepared to ask the Court to break the secrecy on Grand Jury testimony, and if the Court orders that secrecy broken we will provide to the Court the testimony of two witnesses who appeared before the Federal Grand Jury specifically relating to the factual circumstances surrounding these books and records. And I think if that secrecy is broken and that testimony is brought to the Court's attention, that will satisfy, more than satisfy, certainly the Government's burden in this regard.

Mr. Lipschitz: I don't think it would be necessary to break the secrecy. I think what they ought to do is produce the witnesses and expose them to cross-examination. I don't think it ought to be an ex parte proceeding before Your Honor in the same fashion that it was before the Grand Jury.

The Court: I haven't the faintest idea what testimony that would be before the Grand Jury, but it does

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seem to me that if the question is whether Mr. Bellis had a one-third interest and Mr. Kolsby and Mr. Wolf jointly had a two-thirds interest, that this is the type of thing that could be established factually without a great deal of testimony. And I am wondering whether at least that fact could not be established by the Government without a great deal of difficulty by open court testimony rather than by breaking the secrecy of the Grand Jury, which I am most reluctant to do except where it is absolutely essential.

Mr. Bergstrom: Your Honor, as I see it, in order for Mr. Bellis to assert privilege that he asserted, I have to go back again to state that the burden is upon him to establish the proprietary or possessory right in that. That could be done very simply by Mr. Bellis stating what his right is.

Now, assuming that Mr. Bellis was still a member of that law partnership, certainly a statement to that regard would satisfy that requirement, but anything short of that will not establish it.

The Court: As I understand it, defense counsel is saying in effect simply to testify concerning that in and of itself might be in violation, might require him to testify to incriminate himself or to testify against himself. And it seems to me that it is conceivable that it might.

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Mr. Bergstrom: It is conceivable that it might but, on the other hand, it seems to be his burden and if he chooses not to meet that burden because of that fact, then that is his situation.

It happens every day, Your Honor, in courtrooms, in Grand Juries across the country.

He has the right to assert that privilege, certainly, he has the right to establish his burden in those records, but if he chooses not to do so because he feels it may incriminate him, then he cannot meet the burden and, therefore, the subpoena should be enforced.

Mr. Lipschitz: Counsel says it would be chilling the right of the defendant to claim his privilege if he has to disclose facts on which he claims that privilege. As Your Honor so aptly pointed out, if this was a jury and I was asked do I have it or I don't have it, that disclosure enough

would be sufficient to convict me and I can't be required to make that disclosure in order to claim my privilege.

Now, the admission that it may is adequate, if Your Honor please, under the Singleton and Hoffman cases.

Mr. Bergstrom: Your Honor, officers of corporations are subpoenaed day in and day out to produce records. Now, they produce those records, no testimony is taken from them, but they produce the records and they

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indicate that they are the officers of these corporations and the records are then produced.

The same type of situation exists here. They either produce them or they do not produce them. If they do not produce them, the burden is upon them to explain why they have not produced them because, for example, we are not a corporation, or because the material within those records may incriminate us. But he still has to do that. That has to be done by the individual subpoenaed whether he be an officer of the corporation, an officer of a partnership or Mr. Bellis.

The Court: Suppose you subpoena somebody, just an individual, and ask him to produce records of a corporation and he comes before the Grand Jury and he says—you ask him: Do you have in your possession these records, and he refuses to answer on the grounds it may incriminate him because he may have stolen the records.

How do you get around that situation?

Ordinarily you are subpoening the officer who is supposed to have possession of them so it would be clear that he would have legal possession of them. And you don't run into that problem. I am not suggesting there is that problem in this case. But it seems to me it is entirely

conceivable that if Mr. Bellis is claiming a Fifth Amendment right, which he has asserted here in the motion to

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quash, that this might be applicable.

Mr. Bergstrom: Of course, the Government's position is that under the circumstances such as these the Fifth Amendment privilege is not applicable, just as it is not applicable to an officer of a corporation regardless of how he may have gotten the records, whether he stole them or he found them, or whether he took them lawfully. The fact is the Fifth Amendment privilege does not apply to a situation like that, he cannot claim it. And the Government would assert the Fifth Amendment privilege does not apply in this particular case as well.

So, therefore, what we are saying is he has taken the privilege wrongfully and it is his burden to show why he is taking the privilege rightfully.

Mr. Lipschitz: If Your Honor please, there is a complete difference between subpoening somebody to produce records of a corporation and an individual to produce what are his own records or what may be his own records. In the case of a corporation the records never belonged to the officer, they never belonged to the person who appeared in a representative capacity, they belonged to another entity completely, and I think McCormick on Evidence, if Your Honor please, the second edition, makes that very clear on page 269, Paragraph 128, and clearly

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establishes the difference between an individual claiming the right and a corporate officer claiming the right or somebody who appears in a representative capacity.

The Court: May I ask the Government so far as the Grand Jury itself is concerned, I take it that it will remain in session for some period of time?

Mr. Bergstrom: I think the answer to that is yes, sir, for at least another two months.

The Court: I gather that it is urgent however that this matter be disposed of promptly in order that the Grand Jury may continue with whatever it may be investigating?

Mr. Bergstrom: Yes, sir.

The Court: I would suggest that we set tomorrow morning for the purpose of either side presenting whatever evidence either side feels appropriate or proper for them to present. If the Government wishes to rely on the fact that the defendant had the—when I say the defendant, the person subpoenaed has the burden of proof of establishing his privilege, the Government may rely on that, and if the defendant wishes to rely on the fact that the Government has the burden of proof, the defendant may rely on that and then I will have to decide.

But I do think that it would be helpful in rendering any decision that we have those facts about which there probably is really no serious doubt or dispute, and

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it would be appreciated if, without the Government agreeing that it has the burden of proof, it would certainly be appreciated if the Government would present such evidence as would establish certain of the facts that have been alluded to here this afternoon.

Mr. Bergstrom: Yes, sir.

The Court: Which might be a way around this dilemma. Because, as I say, I am not sure which one will have the burden of proof of going forward with the evidence. It does always seem to me somehow that where a person claims a constitutional privilege which on its face is certainly not a privilege claimed, that to some extent it should be up to the Government, it seems to me, to show that that constitutional privilege is not applicable in this situation. And if that may depend upon factual circumstances, and I do believe that, as I read the cases at least they all discuss these various factual aspects, it seems to me that perhaps the Government should go forward with the evidence.

Mr. Bergstrom: We are prepared to do that, Your Honor. I will have the necessary Grand Jury testimony available and would ask the Court to break the seal on that testimony.

Mr. Lipschitz: May I ask Your Honor——

The Court: Just on that regard, and again I am not ruling on that, on any such application, but I

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think it might be preferable if it can be done, to have the actual witnesses testify in open court on that aspect of it, which I gather will be simply a question of who has the possessory right to these particular partnership rights.

Mr. Lipschitz: If Your Honor please, we don't want to delay this matter, we would like to have it disposed of, but I am actually engaged in the trial of a case before Judge Smith which started last week, and we have a jury in the box and evidence is going to be submitted tomorrow and the case will probably last anywheres from a week to ten days. But if Your Honor would set some afternoon for this mater,

preferably next Tuesday, when we have Election Day and too many people will not be engaged——

The Court: I don't want to continue it that long, Mr. Lipschitz. I realize the problem that you may have, on the other hand, there is eminent co-counsel here, Mr. Sarner.

Mr. Lipschitz: By coincidence he is also engaged tomorrow, I am informed.

Mr. Sarner: Tomorrow morning, Your Honor, I was asked to speak before my daughter's high school class on a search and seizure subject, so I don't know how important that it. But that is in the morning for an hour and a half. But aside from that, I would be available.

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The Court: May I speak to counsel off the record on this phase of it.

Please come up here.

(Discussion off the record.)

The Court: After conferring with counsel off the record, we will fix tomorrow afternoon at 4:00 o'clock. At that time counsel may make any further applications counsel feels appropriate or present any testimony or evidence that counsel wishes to present.

If possible, and if time allows, I would hope that perhaps certain facts might be stipulated to; but by suggesting that I am not suggesting that defense counsel should in any way stipulate to any facts if counsel feels that that prejudices the defense's position in this case.

We will take a recess of this case until 4:00 o'clock tomorrow afternoon.

(Adjourned at 5:10 P. M.)

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Miscellaneous.
No. 73-95.

IN RE:

GRAND JURY INVESTIGATION
ISADORE H. BELLIS, A WITNESS

Philadelphia, Pa., May 10, 1973.

Before HON. DONALD W. VAN ARTSDALEN, *J.*

APPEARANCES:

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(Commenced at 4:00 o'clock P. M.)

The Court: Good-afternoon, gentlemen.

Mr. Sarner: Your Honor, before we proceed with the testimony I would like permission to give a brief summary of what our position is——

The Court: That will be fine, and I think it might be helpful, Mr. Sarner.

Mr. Sarner: —with the books and records, because there is sometimes a lot of confusion in this particular area.

Your Honor, first you have to distinguish in connection with these cases because the bulk of them you will notice involve tax investigations between those matters which support material to be disclosed in a tax return and those which are considered to be purely private personal matters.

It is undenied that the books and records of an individual taxpayer are subject to the protection of the privilege against self-incrimination contained in the Fifth Amendment, and he himself, so long as he has possession of them, the Government has never in recent years attempted to obtain them from the taxpayer.

Your Honor may recall the so-called discarded

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requirements documents rule in the famous Shapiro case, which is an OPA case, where the Government successfully argued in the Supreme Court of the United States that records required to be kept by the Emergency Price Control Act were required by law and therefore were not within the protection of the privilege against self-incrimination.

The Government thereafter in a number of cases, particularly the Falsone case in one of the courts of appeals, argued that that rule would apply in an ordinary tax investigation, that the records which all of us as taxpayers have to maintain are required by law by the Code to be kept, and therefore, were not covered by the privilege.

Interestingly enough, some courts adopted that. The Third Circuit in an earlier case cast some doubt as to whether that was the rule. But, in any event, it is now well accepted since 1969, the Stuard case, which is cited in the little memorandum I supplied to you, Your Honor—it is spelled wrong, it is S-t-u-a-r-d, it is spelled S-t-e-u-a-r-d, it is misspelled in the brief—the Stuard case has the concession by the Government and so the Government admitted that the Department of Justice has not in recent years, and they have not argued, that books and records required to be kept for Internal Revenue purposes are required by law as such within that Shapiro doctrine.

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So that we do start out with the proposition that ordinarily what is typically in books and records, and maintained in connection with the going business used for the purpose of preparation of tax return material and the like is protected.

Then you have a series of cases illustrated by the Couch, illustrated by the Egenberg case in the Third Circuit, by the Cohen case in the Eighth Circuit where the taxpayer doesn't prepare his own return but he supplies the information, he provides his books and records to the accountant or even to an attorney in the role of an accountant, to prepare the return.

Now, here you run into a difficult problem because the cases have suggested that if the material is supplied to

support what will appear in the tax return, the material which is to support the tax return is not given in any confidence. So that the attorney-client privilege doesn't protect that from going out, there is no accountant-client privilege in this particular area, and hence although normally materials and books and records are free from scrutiny, if they are actually put out of the possession of the taxpayer himself, if they are put out of the possession of the taxpayer for purposes of disclosure, and it is a disclosure if it is to support what is in the tax return,

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then it is not covered by any privilege. It is not covered by the privilege against self-incrimination because the taxpayer has turned it over to his accountant or his attorney and therefore is not in possession of it, and it is not covered by any privilege covering disclosures made in confidence because none exists with an accountant, and the attorney who takes it doesn't take it in confidence, it is to support the return.

Now, to amplify and to show the relevancy of that doctrine so far to our case, the books and records are for purposes of this proceeding now under the Government's view in the possession of Mr. Bellis, so they have not been in any way transferred, in possession, to a third person.

Our testimony will show, the evidence will show that the books and records may, as shown in the initial memorandum that we submitted, contain many things which are of a personal testimonial declaratory statement nature, covered clearly by the privilege against self-incrimination.

For example, they could very well show some expenditures as any books which the Government may claim are not properly deductible; they could show receipts which

the Government may claim were not reported; they could show a lack of an entry, and that is a record, as Your Honor knows, under the modern tendency if normally. If an event occurred and there would be a record of that, the fact that there is

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no record in the books indicates that it didn't occur. So it could very well be an absence of an entry which would lead the Government to believe that possibly this receipt has not been say reported in a proper tax return. It could show dealings with particular individuals under circumstances with which the Government may claim involve some taint of illegality or so.

So we do have in these books and records the personal aspect, which may or may not be in any way, had no way been used by the moveant here, by Mr. Bellis, to support anything in a tax return; they haven't been submitted to an accountant, they haven't been submitted to an attorney to prepare his return and, therefore, have lost that aspect of the privilege.

Secondly, Your Honor, I don't think there is any doubt, and I don't mean to be presumptious, I had the idea from Your Honor's comments yesterday that there is no doubt even in Your Honor's mind that ordinarily books and records of a small partnership as such are covered as opposed to the books and records of a large unincorporated labor-union association, or the types of tremendous limited partnerships or types of brokerage houses with which we are familiar where you have 50, 60 partners and 200 employees, and several million dollars of receipts.

The Court: I am not sure that is a correct

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statement of my views. I did indicate yesterday, and I think it is true, that at least the cases seem to indicate that there may be a distinction between partnerships and other types of business associations; and certainly some of the cases at least discuss their decisions the size of the particular partnerships.

Mr. Sarner: Yes. Well, Your Honor, you will note we referred to the Cogan, the Slutsky case, I have the Lawn case referred to in the memorandum, I have a case in re subpoena duces tecum, which was not cited in the brief——

The Court: Where is that from, Maryland?

Mr. Sarner: Federal Supplement—which deals with a small partnership.

I would think, Your Honor, that our proceeding on the basis that what I say we believe is correct, and hope to convince Your Honor that it also is correct, the testimony will show that this firm of Bellis, Kolsby and Wolf consists of three partners, at most it had one professional full-time employee and part-time professional employee and three secretaries and, therefore, it may be a total at the most of four or five employees and three partners, some seven or eight people associated with it in these years. So it is in my mind clearly the type of

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organization having the individual, personal nature which distinguishes it from the famous White case on the CIO labor-union, and the Mal Brothers, and the Silverstein cases, Onassis, cited by the Government.

Now, they do cite the Quick case which doesn't indicate whether it is a large partnership or not. But in the

Quick case this went off on the failure of the proof to show what the books and records were. You see, that is why I emphasized initially if the books and records are merely to support what is in the tax return, and that is the inquiry, I mean it is what is in this tax return supportable as such, and it was distributed and transmitted to a third person for purpose of preparing the return, it is not covered. We agree the Cooke case indicates that, and all that the Court in the Quick case says is that no showing was made by petitioner that this contained any personal testimony material.

The Court: It is possible that that might become an issue, although the subpoena that was issued requires all partnership records to be turned over and, therefore, I take it that we are not concerned with the nature of the content of the records.

Mr. Sarner: That's right.
Now, Your Honor, rightfully so, this is an

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important point, concerned itself with the rights of the partners vis-a-vis on dissolution, and I, in the short time that was available, tried to research this point.

I think it is clear, Your Honor, that during the progress of the partnership, under the Uniform Partnership Act, the partners have an interest in partnership, some co-tendency in partnership, which is similar to other joint ownership, common ownership, jointly and severally in the entire property; no one owns any particular record but they have this either one-third you might say interest, indivisible interest therein.

Now, it is curious to note that at best all the cases suggest that the dissolution would give greater individual rights, not lesser rights.

The Curcio case in the Supreme Court of the United States, which we refer to in the brief, discusses the situation where the individual shareholders argue that when the corporation was liquidated and dissolved, and the books came to them as transferees, they took on greater rights than they had when the corporation remained in existence. It was never suggested that when the corporation liquidated and dissolved there would be less rights, they argued that there were greater rights.

Now, the Supreme Court of the United States said no, the liquidation of the corporation doesn't add

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to the rights of the shareholders.

Now, the Government——

The Court: Excuse me. There is a Supreme Court case, is there not, that says that even though there was just one stockholder and if there was a dissolution it was still subject to being——

Mr. Sarner: Yes, that is one of the reasons why a lot of tax practitioners won't have their clients adopt subchapter "S" or form a professional corporation because the one stockholder, I mean if he is worried about his income tax criminal responsibility, he'd lose his privilege against self-incrimination on it. That is true. If you adopt the corporate form, then you are bound by the limitations as well as by benefits.

But the Government here, as we read the Government's position, is that the dissolution of the partnership detracts

from the rights. No one ever suggested that it adds or detracts. I mean it continues the same.

And, actually, I found one case in the Court of Appeals of New York, it is a 1931 case, when Justice Cardoza was still on the Bench, Sanderson vs. Cooke, Your Honor, which deals with the dissolution of a partnership, and there is some appropriate language, you

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know, not absolutely pertinent or so, but it does indicate that on the dissolution of a partnership the books remain, I mean, in common ownership, and, therefore, neither partner has any individual rights in them against the other.

Now, our view here is that clearly the partner will assume for purposes of the Government's position that Mr. Bellis, the former partner, is in possession of the books. He is in possession not as an agent, he is in possession as a co-owner. And this, of course, distinguishes the thrust of the Government's argument that the Egenberg case or that the Cohen case, which suggested is distinguishable or doesn't bear too much weight in this circuit, would be applicable.

In all of those cases, Your Honor, you have there the accountant, some third person, who has mere possession as an agent of goods belonging to another.

Obviously, under any view the partnership books in the hands of Kolsby, in the hands of Wolf, in the hands of Bellis, are equally owned by one of the owners; he is not in possession as an agent for anyone else as such, and, therefore, he has both ownership and possession, which was the crux of the rationale of the Supreme Court in the Couch case.

In Couch they say admittedly books and records

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owned by a taxpayer in his own possession would be free from seizure by the Government under a subpoena; but if he delivers them to the accountant then he has given up possession, therefore, they can be seized from the accountant.

In our case, under the Government's view, we are in possession of the books, we are an equal one-third owner, or so, we have an undivided ownership interest in the books and records, we can't say that we only own this particular one and therefore having ownership and possession the rationale of Egenberg in no way applies to defeat the claim of the Fifth Amendment.

Now, Cohen does have very appropriate language, even assuming that the Court may have been wrong by saying that one in mere possession of goods belonging to another can assert the privilege.

We cite on page 4 of the memorandum, Your Honor, the reference to Wigmore and to McNaughton on evidence, where the Government cannot step into the shoes of one of the partners, vis-a-vis a partner, and say that since the partner could for partnership purposes have the right to see the books or possibly get the books, we don't know that we would admit that any partner could get the books as such, maybe they could see them, we would never say they could get them—obviously the Government is not coming in for any legitimate partnership purpose,

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and hence would it be our view that they would not be able to be subrogated, as it were, to the rights of any of the public partners.

Now, we will show, I mean the testimony will show, as I say, the nature of what the books contained, that it contained non-incriminating material, the testimony will show where the possession of the books were, the ownership, the nature of the law partnership, and I think with that in mind I trust we haven't taken up the time unnecessarily of the Court in explaining our position which we hope to develop.

The Court: I appreciate that, Mr. Sarner.

I want to ask one thing to be sure that I am completely clear on this. The claim of privilege here is by reason of the contents of the record and not by reason of the fact of the possession of the records themselves. Am I correct about that?

Mr. Sarner: Is it possible? Yes, the possible content of the records, that is right.

The Court: In other words, it has apparently been stated by Mr. Lipschitz, and I gather by you at least inferentially in your argument, that it may be assumed that Mr. Bellis had some records, and that those records he maintains he has lawful possession of. In other words, it

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is not the mere fact of the possession itself or the requirement of claiming.

Mr. Sarner: Your Honor, the Couch case—no, no, we cannot make the argument that we don't have possession, that we have the ownership.

The Court: No. What I want to be sure of is that you are not making the contention that the mere fact of possession——

Mr. Sarner: —is enough.

The Court: —the mere fact of having to admit that he has possession would in some way be self-incriminating.

Mr. Sarner: I think it would.

The Court: That is what I want to know.

Isn't it really because of the content of the books and not the fact that he has the books?

Mr. Sarner: Well, let's take it—obviously, the content of the books have to tend to incriminate him, have to be, you know, available to incriminate him.

Now, let's assume that we had books that would tend to incriminate him. It could conceivably be true that after the subpoena the person in possession of the books destroyed them. That would subject him to penalty. And, therefore, when he is asked: Do you have possession of

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the books, did you have possession of them, he doesn't have to say a word.

Now, the Supreme Court has specifically said, Your Honor, in the Curcio case, he doesn't have to explain the whereabouts at all, he doesn't have to say one word, he does not have to get on the stand and say one word. And that is right I am sure in the Egenberg case.

The Court: I wouldn't agree with that because it does have to specifically claim the privilege to the question.

Mr. Sarner: Here, in Wilson vs. U. S.—this is cited in Egenberg, I am reading, it says, citing from Wilson vs. U. S.:

> Where an officer of a corporation had possession of corporate records which discloses crime there is no

ground upon which it can be said he would be forced to produce them if the entries are made by another but may withhold them if the entries are made by himself.

So he has to produce them.

Now, they may decline to utter on the witness stand a single incriminating word, they may demand that any accusation against them individually be established without aid of their

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oral testimony or their compulsory production by them of their private papers.

I would take the view, Your Honor, that if where asked: Do you have possession of the books, I don't think he could just remain silent, I think he would have to say: "I refuse to testify on the ground that this tends to incriminate me." And I have indicated why that possibly could. I am not in any way suggesting that is the facts in this case. I want that perfectly clear.

The Court: Of course not.

Mr. Sarner: But there is no doubt in my mind that if a witness served with a subpoena has intentionally destroyed the books or has done something to them, he clearly doesn't have to disclose their whereabouts. And we have the Curcio case——

The Court: Let's assume that he doesn't have to disclose their whereabouts, but suppose instead of asking him a question for which he must give some testimonial answer they say: Deliver to us the books that you have in your possession.

Mr. Sarner: And then he refuses.

The Court: Right.

Mr. Sarner: Now, the Government has one thing to do. They can proceed against him in a proceeding,

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and they must establish at the time that the subpoena was issued he had the books, independently. He doesn't have to say one word.

The Curcio case points out: They, the custodians, may decline to utter upon the witness stand a single incriminating word.

The Court: In view of that, it seems to me that it does become important to know what if anything occurred before the Grand Jury so far as Mr. Bellis is concerned as to whether he did claim privilege or not.

Mr. Sarner: I think that is so, Your Honor. I think on that preliminary point you are perfectly right.

Let me just say on page 122 of the Curcio case, 354 U. S., it says: Returning therefore to the remaining issue whether petitioner's personal privilege against self-incrimination attaches to questions relating to the whereabouts of union books and records which he did not produce pursuant to the subpoena.

They asked him where they were and he refused to testify. And they sustained that because that would tend to incriminate him.

The Court: I would like to ask Government's counsel, in view of the last colloquy that took place here, whether Government's counsel wishes to make any motions or

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applications so far as revealing the Grand Jury proceedings that may have taken place in the event that Mr. Bellis was called to testify before the Grand Jury. I know not whether he was or was not called.

Mr. Bergstrom: Are you asking me, sir, to reveal what Mr. Bellis said in the Grand Jury?

The Court: I am asking you whether you are going to make any application for the breaking of the secrecy of the Grand Jury for that purpose.

Mr. Bergstrom: Yes, sir, I will make that motion, and the Government so makes that motion under 6(e) to break the secrecy to reveal to the Court what took place before the Grand Jury when Mr. Bellis was subpoenaed.

The Court: It seems to me that before we can come to any determination on the Government's motion to compel the delivery or to compel the delivery of the books and records, that it would be necessary to ascertain what if anything the Grand Jury did to secure these books and records and, therefore, under Rule 6(e) I will direct that the secrecy of the Grand Jury be broken for the limited purpose of showing what may have transpired in the event that Mr. Bellis was called before the Grand Jury.

In that regard, I don't know how you propose to show that, whether you have the secretary or stenographer

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who took down any notes, or——

Mr. Bergstrom: Your Honor, with permission from counsel, I can relate to the Court what took place in front of the Grand Jury.

Mr. Sarner: We have no objection.

The Court: It seems to me that this is the type of thing where counsel could relate it. If there is a factual dispute, of course, if your client disputes it in any way, it might have to be established by the secretary.

Mr. Lipschitz: We don't know, we weren't there, our client was there.

The Court: All right, Mr. Bergstrom, if you will state what happened only so far as when Mr. Bellis was called before the Grand Jury.

Mr. Bergstrom: Mr. Bellis was called before the Federal Grand Jury yesterday afternoon at approximately 1:00 P. M. He entered the Grand Jury room, he was sworn by the forelady. I asked him his name and his address, which he gave me.

I asked him specifically whether or not he was appearing before this Federal Grand Jury in response to a subpoena served upon him, Isadore Bellis, with an address of 709 Medary Avenue, Philadelphia, Pennsylvania, which directed him to appear before that Federal Grand

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Jury on the 9th day of May of 1973, at 2:00 o'clock P. M., and to bring with him all partnership records currently in his possession for the partnership of Bellis, Kolsby and Wolf for the years 1968 and 1969.

In response to that question Mr. Bellis said that he was there pursuant to that subpoena.

I then asked Mr. Bellis if he had brought those records with him and was he going to produce them in accordance with that subpoena. And Mr. Bellis advised me that on advice of his counsel that he was asserting his privileges

under the United States Constitution, and specifically the First, Fourth, Fifth and Sixth Amendments thereunder, and was refusing to produce the books and records called for in the Grand Jury subpoena.

My next question to Mr. Bellis was whether or not he had possession of those particular records that were called for in the Grand Jury subpoena, to which Mr. Bellis responded that on advice of counsel he was again asserting his privilege I believe under the Fifth Amendment of the United States Constitution as to that question.

At that particular point in time I dismissed Mr. Bellis from the Grand Jury and we proceeded to this courtroom.

The Court: Mr. Bergstrom, I don't understand

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the last question that you say you asked Mr. Bellis, asking him whether he had in his possession those records called for in the subpoena, if that was the question, because the subpoena requires that he "produce all partnership records currently in your possession."

So that obviously it could only refer to such books as he did have in his possession.

Mr. Bergstrom: Right, yes, sir. I understand that is what occurred before the Grand Jury.

Now, Your Honor, if I might——

The Court: Just a moment on that.

As I have indicated before to counsel for Mr. Bellis, if there is any factual dispute as to what took place there, perhaps counsel should consult with Mr. Bellis at this point.

(Counsel confer with Mr. Bellis.)

Mr. Lipschitz: If Your Honor please, Mr. Bergstrom states that is substantially what transpired. I don't know

whether it is customary of this Grand Jury to make a transcript of what the witness said.

The Court: Mr. Bergstrom, is there a transcript?

Mr. Bergstrom: There is not one available at

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the present time. There will be a transcript available; it is just a matter of getting it typed up.

The Court: If it is necessary then that could be——

Mr. Lipschitz: Then Your Honor may obtain the transcript.

The Court: Mr. Bergstrom, as I understand it, then in the sequence you first asked him whether he was there pursuant to the subpoena, and then asked him to produce the books that he brought pursuant to the subpoena.

Mr. Bergstrom: I asked him to produce the records if he brought them.

The Court: And what answer did he give?

Mr. Bergstrom: Well, in response specifically to my question: Will you produce those records, his response was on advice of counsel he was asserting the First, Fourth, Fifth and Sixth Amendments of the United States Constitution.

The Court: All right.

Let me say, and I am not making this as a final decision, but it is my preliminary view that the question where he was asked does he have possession of any books and records, which he refused to answer on the basis of the Fifth Amendment, it would seem to me that that is the type of testimonial evidence that is sought that a person

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would have the right to refuse to answer because conceivably whether he possessed them or not, the very fact of possession might or might not incriminate him.

But, as I understand it, there was a request in which you asked him: Will you produce those records, and that he refused to product those records as called for in the subpoena.

Now, as to that it seems to me that is not in and of itself calling for testimonial evidence, and, therefore, it is a claim of privilege; and it is my view that if there is a claim of privilege such as that, that the burden is incumbent upon the person asserting the privilege to show that he is privileged not to produce them.

I simply say that to indicate that it is my view that having shown the subpoena and having shown that Mr. Bellis has refused to produce the books as called for in the subpoena under a claim of privilege, that it becomes incumbent upon him to sustain his claim of privilege and the mere claim that it might incriminate him would not in my opinion be adequate justification in view of the nature of the subpoena which is directed to Isadore Bellis and directs that all partnership records currently in his possession for the partnership of Bellis, Kolsby and Wolf for the years 1968 and 1969 be produced.

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Mr. Lipschitz: May I point out to Your Honor that Mr. Bellis has just given me a typewritten statement which he claims he submitted to the Grand Jury orally in response to the inquiry made by Mr. Bergstrom.

He said, "I did not," when he was asked about the books, "on the grounds that under the Constitution of the

United States, particularly but not limited to the First, Fourth, Fifth and Sixth Amendments, and the constitutional laws of Pennsylvania, I cannot be compelled to be a witness against myself or give evidence against myself, and the books and records may contain private testimonial, personal statements, and information which might be considered as so doing, all of which counsel has advised me, and on which advice I rely, give me the right to refuse production of the records and books you are referring to, or answering any questions in connection with them."

I think that would change the——

The Court: Do you agree that that was given?

Mr. Bergstrom: I think that is probably what was said, but I fail to see how that sheds light on the issue at all.

The Court: Gentlemen, I have indicated to you that it is my belief that it would be incumbent upon the defendant —not the defendant but rather Mr. Bellis to sustain his claim of privilege under the circumstances.

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I will leave it up to counsel whether they wish to present any testimony.

Mr. Lipschitz: Mrs. Lipman.

HARRIET LIPMAN, having been duly sworn, was examined and testified as follows:

Mr. Shmukler: If Your Honor please, may the Court note for the record that Mrs. Lipman is accompanied by counsel, Stanford Shmukler, a member of the Bar of this Court.

The Court: Mr. Shmukler and Mrs. Lipman, if there are any questions and you wish to consult with your counsel before answering them, you may do so.

DIRECT EXAMINATION.

By Mr. Lipschitz:

Q. What is your occupation?

A. I am a secretary.

Q. By whom are you employed?

A. Cohen, Bellis & Verlin.

Q. How long have you been—are you associated with Mr. Bellis?

A. I am Mr. Bellis' personal secretary.

Q. How long have you been employed by Mr. Bellis or in any enterprise with which Mr. Bellis was associated?

A. Approximately 27 years.

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Q. Do you know when Mr. Bellis and Mr. Kolsby and Wolf became partners?

A. In 1955 or 1956.

Q. And is that the time that Mr. Bellis formed a partnership with Mr. Kolsby?

A. Yes.

Q. There was another partner there named Wolf, Edward Wolf?

A. Yes.

Q. Did he come later?

A. Yes.

Q. What were your duties during the time that the firm of Bellis, Kolsby & Wolf partnership existed?

A. I was the office manager, I was the bookkeeper, I was Mr. Bellis' secretary, I did work for Mr. Kolsby, I took

medical examinations of clients, with clients and doctors, and ran the office.

Q. What was the nature of their practice? Did they specialize in any particular field?

A. It was mostly negligence and there was some non-negligence work, too.

Q. About how many people were employed by the partnership in 1968 and 1969?

A. Five, six.

Q. Can you tell us who they were, I mean what duties they performed?

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A. I know we had another lawyer, and I know there were a couple of secretaries, and there was a young man who would go to City Hall for us.

Q. Who was the senior partner of the firm?

A. Mr. Bellis.

Q. What were your duties in connection with the books of the firm?

A. Well, under the supervision of William Blumberg, our accountant, I was to make the entries, I was to enter receipts and disbursements, write checks, and so forth.

Q. Did Mr. Bellis ever give you any instructions with reference to any entries or how to treat certain items which later appeared in the books?

A. From time to time he did.

Q. Did he supervise your work on a day-to-day basis or was it periodic?

A. It was periodic.

Q. Did the books contain personal statements of information concerning the partners, particularly Mr. Bellis?

A. Yes, they did.

Q. Were you told to record personal matters or personal accounts to charge the partners' account?

A. Yes.

Q. And what items, if you recall, may have been involved?

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A. Well, there may have been country club—is that what you mean, Mr. Lipschitz?—restaurant charges, and other things.

Q. Private transactions?

A. Yes. Private parties, yes.

Q. Expenses?

A. Yes.

Q. Did you remain with Mr. Bellis during the entire time that the firm of Bellis, Kolsby & Wolf was a partnership?

A. Yes.

Q. When was it dissolved, if you know?

A. Physically in 1970, January of 1970. By that I mean that is when we left.

Q. By physically is that when Mr. Bellis moved out?

A. The partnership was dissolved three months before that but we did not leave until the beginning of 1970, February of 1970.

Q. At that time what was the arrangement as far as you can recollect concerning the books and records of the partnership?

A. Do you mean where they were? I don't follow you.

Q. Did you have any discussion with Mr. Bellis concerning the records?

A. Yes. It was—we didn't know. I asked whether or not we should take them with us and we had such limited

space we didn't know what we were going to do so we decided to leave

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them in Mr. Bellis' room, in his cabinets, where I had always kept them, where there were files, it was like file cabinets, because it was easier to do that, just leave them there.

Q. Now, did the other members of the firm participate in that discussion?

A. I don't remember. Mr. Kolsby may have been there at the time, I can't recall.

Q. Were any records taken?

A. Yes, there were some records.

Q. And where were those records left in the old firm at the old location?

A. They were left in the old office, in Mr. Bellis' room, in his cabinets.

Q. Now, after the dissolution of Mr. Bellis did you have access and refer to records—made himself available of any of the records which are now being discussed?

A. Yes.

Q. And under what circumstances did he ask you to obtain records or bring them to him?

A. Well, there may have been some questions that arose and I would call on the telephone and ask for the information. If the information was not available, usually they couldn't find anything, I would go over to that office and I would find the information myself, get it or bring it back, or

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whatever.

Q. Did you have any problem obtaining the records?

A. No.

Q. Or did you have free access?

A. Free access.

Q. Was there ever any question raised as to whether or not you were authorized to inspect the records or remove them at Mr. Bellis' request.

A. Never.

Q. I think you indicated that you removed records periodically; is that correct?

A. From time to time, yes.

Q. When did you physically get the last installment of the records or the records which are involved in this inquiry?

A. I don't know, it was the end of February or the beginning of March. I can't give you a date.

Q. At whose instance?

A. Either yours or Mr. Bellis.

Q. Did you advise anyone that you were going to get the records or wanted to get them?

A. Well, I called, as I did in the past when I needed anything, and I told, I think I spoke to Miss Baylis, Mr. Kolsby's secretary, and then I went over and I took what I could carry.

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Q. Was there any objection of any kind raised by anyone?

A. None whatsoever.

Q. Did anyone at the old office aid you in obtaining the records?

A. Miss Baylis did, and also their bookkeeper, their present bookkeeper.

Q. Did Mr. Kolsby or Mr. Wolf know that you were taking the records?

A. Yes. As a matter of fact, Mr. Kolsby was present once—well, he had Mr. Bellis' room, he moved into Mr. Bellis' room and the records were in there, so we chatted while I got them together.

Q. What was Mr. Bellis' interest in the firm immediately before the dissolution, percentagewise?

A. 45 percent.

Q. That was in dissolution?

A. Yes.

Q. Are there remittances of money between the two of them even today?

A. Oh, yes.

The Court: Excuse me. I didn't understand that last question.

By Mr. Lipschitz:

Q. Will you explain that?

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A. Well, our office has cases and they settle cases, and the other firm gets part of it, a percentage of the money, and then when they settle cases in that office we get—well, our new office gets a percentage of the money.

Q. And were these older cases, I mean some of them even preceded 1969 and 1968?

A. Yes.

Q. In other words, cases have been settled?

A. They are still being settled.

Q. Are still being settled. That is files that were subsequently retained by Mr. Bellis taken by Mr. Bellis and others that were retained by Kolsby and Wolf?

A. Right.

Q. And as settlements were made for the matter that was disposed of, there was an exchange in the funds?

A. Right, that is exactly right.

Q. Where were your offices located?

A. Where were they located? 1420 Walnut Street.

Q. And what did they consist of physically?

A. Physically, you mean how many——

Q. How many rooms?

A. Mr. Bellis' room, Mr. Kolsby's room, my room, Mr. Chillemi's, Mr. Wolf's, the file room—how many rooms——

Q. Would the stationery reveal the fact it was a firm

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name?

A. Oh, yes. Bellis, Kolsby & Wolf, yes.

Q. And to your knowledge were there partnership returns filed?

A. Yes.

Mr. Lipschitz: No other questions, sir.

Cross-Examination.

By Mr. Bergstrom:

Q. Mrs. Lipman, I am not clear on exactly how many people were in the firm during 1968 and 1969; Mr. Bellis, Mr. Kolsby, Mr. Wolf?

A. Yes.

Q. How many other lawyers by name were there?

A. Mr. Chillemi—I think of the rooms. I don't think there were any more lawyers. I can't remember, I don't think there were any more attorneys.

Mr. Lipschitz: May I ask counsel what he means, in the firm, was it on the premises, physical facilities?

The Court: I think that is proper, that we should find out whether you are speaking of partners or associates or just employees.

By Mr. Bergstrom:

Q. That is what I am trying to arrive at.

A. Employees were Mr. Chillemi, who was an attorney; I

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think there were three secretaries, perhaps four, and a young man who did our City Hall work.

Q. Now, were they part of the law firm, those other two gentlemen, Chillemi and the young man?

A. Yes.

Q. They were part of the firm?

Mr. Lipschitz: You mean by part——

Mr. Bergstrom: Wait a minute. The witness can answer the question.

The Court: Just a moment, Mr. Bergstrom and Mr. Lipschitz. I think although this young lady is a legal secretary, and apparently has a lot of experience, the question of whether a person is a member of the firm may have different context to different people and what we really want to know is whether they were members of the firm or associates or employees.

Mr. Bergstrom: And I agree. I think if the witness doesn't know she can so state, if she does know, fine.

The Witness: As far as I am concerned, he was an employee.

By Mr. Bergstrom:

Q. He was an employee?

A. Yes.

Q. So you don't know whether or not he was an official,

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a member of the firm, so to speak, a partner in the firm?

A. He was not a partner.

Q. He was not a partner?

A. No.

Q. Mr. Chillemi was not a partner?

A. No.

Q. And the young man who did the work was also not a partner?

A. No.

Q. But he worked with the firm?

A. Yes; he was an employee.

Q. He was an employee?

A. Yes.

Q. Were there any other people like Mr. Chillemi and like this young man who did city work?

A. There was nobody else who did City Hall work. And I cannot remember another lawyer. Maybe there was, I can't——

Mr. Shmukler: Your Honor, may I consult with Mrs. Lipman for just a moment?

The Court: Yes, you may.

(Mr. Shmukler conferred with the witness.)

The Witness: May I say something, please?

The Court: If it is responsive to the question asked.

The Witness: There were lawyers in our

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office who rented space from us but they had nothing to do with us.

By Mr. Bergstrom:

Q. I understand that.

Now, concerning the books and records that you kept. Who had access to those books and records?

A. The partners.

Q. So all of the partners, and by that I mean Mr. Bellis, Mr. Kolsby and Mr. Wolf had access to the records?

A. Yes.

Q. And did anyone else have access to the records besides yourself?

A. No.

Q. Did Mr. Blumberg?

A. Oh, yes.

Q. Mr. Blumberg had access?

A. Yes.

Q. So there was Mr. Bellis, Mr. Kolsby, yourself and Mr. Blumberg. Any other person who had access to those records?

A. Well, those in Mr. Blumberg's office, that is all that I know of.

Q. So that people working in Mr. Blumberg's office would also have access?

A. Yes.

Q. Now, Mr. Blumberg was the accountant at that time; is

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that correct?

A. Yes.

Q. How were these records kept?

A. I had a cash receipts book and a cash disbursements book.

Q. What else did you have?

A. I had cards for each case, each and every case in the office.

Q. Now, at any time, as I understand it, any member of that partnership, as well as yourself and Mr. Blumberg, could look into those records briefly; is that correct?

A. Yes.

Q. Now, you indicated that there were personal items in the records. What kind of personal items were there?

A. Oh, Boy! Country club.

Q. When you say country club, what do you mean, country club?

A. Well, bills from country clubs.

Q. Bills from——

A. Bills that were paid.

Q. What type of bills would these be, what would they represent?

A. Charges made at the club.

Q. And who would have charged it?

A. Those people who belonged to, those partners who belonged to country clubs.

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Q. So Mr. Bellis made charges to the country club and they would send him a bill?

A. Pardon me?

Q. Mr. Bellis would charge something at the country club and the country club would then send the law firm a bill; is that what you are saying?

A. Well, no, not the law firm. Mr. Bellis would receive the bill at the office and it was charged—I would pay the bill and it was charged against Mr. Bellis' draw account.

Q. Would the same thing occur with Mr. Kolsby and Mr. Wolf?

A. Yes, that is exactly right.

Q. How were those bills paid, what type of check was drawn?

A. A check out of my regular account.

Q. Which is, the regular account is under what name?

A. Bellis, Kolsby & Wolf.

Q. Bellis, Kolsby & Wolf. So you were paying these bills with partnership checks?

A. Right.

Q. You weren't paying them with the personal check of Mr. Bellis?

A. No.

Q. Now, other than country club, what other type of personal, as you categorize personal items, were there?

A. Restaurant charges.

Q. Do you know——

A. I haven't done this for three years. I have to remember.

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I don't know.

They are the ones that stand out.

Q. Restaurants?

A. There was a Bar Mitzvah and I remember that that was also paid out of the office.

Q. By that you mean it was——

A. And charged against the partner.

Q. It was paid for by the partnership check?

A. Yes, that's right. There were many items, I just can't remember.

Q. But now when you talk about these personal items specifically concerning the country club bills and the luncheon bills, you don't know——

A. Restaurants.

Q. —or restaurant bills, I am sorry, you don't know what transpired at those particular meetings, do you, in the restaurant or at the country club? In other words, it could have been a business luncheon?

A. Yes.

Q. It could have been a business day at the country club; is that correct?

A. That's right.

Q. So it may very well not have been a personal expense, it could have been, very well have been business?

A. No, it was broken down usually. I would be told so

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much of this is personal, so much of this is business.

Q. So some of it was categorized as business and some of it was categorized as personal?

A. Yes.

Q. Now, did the accountant have access to all these records?

A. Yes.

Q. Do you know why he had access to all those records?

A. He just had. I was told to give them to him.

Q. Was there any reason why you were told to give them to him?

A. No. Because he was the accountant.

Q. Do you know who prepared the tax returns?

A. He did.

Q. So was it fair to say that he was given those records to prepare tax returns?

A. Yes.

Q. Did Mr. Blumberg prepare the partnership tax return?

A. Yes, he did.

Q. Now, you indicated that sometime in September the partnership was dissolved.

A. I don't know, I didn't indicate September. I said a few months before.

Q. All right, a few months before, January 1, 1970. And then you moved out on January 1 of 1970.

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A. February.

Q. February.

Now, when you went back to—you indicate that you had access to the records, you had access to the records since that time?

A. Yes.

Q. What records have you actually taken and kept since that time other than the ones you took?

A. I am sorry, I can't answer you. I don't know, I don't remember.

Q. You don't know?

A. No.

Q. Do you know whether or not you have actually taken records between February, 1970 and up to the point where you indicated you went over and got all of the records, during that period of time?

A. Say that again?

Q. From February of 1970——

A. February of 1970, yes.

Q. From the time you left up until about two months ago, when you went over at Mr. Bellis' request to get all the records——

A. Yes.

Q. During that period of time, that approximate three-year period, do you specifically recall taking records from

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Bellis and Kolsby, from that office, and keeping them?

A. Yes, I do.

Q. You do?

A. I think, yes.

Q. No question about it?

A. Yes, there is no question about it.

Q. And keeping those records?

A. Are you talking about files?

Q. I am talking about the records that you have described.

A. Yes.

Q. And not returning them?

A. No.

Q. You just kept them?

A. Yes.

Q. Do you specifically recall what records that might have been?

Mr. Lipschitz: She has answered that question. She already said she doesn't recollect.

The Court: I sustain the objection.

By Mr. Bergstrom:

Q. Now, on other occasions you indicated that you would telephone to the partnership and ask them to check certain things for you in the records; is that correct? Did you do that often?

A. Sometimes it was often and sometimes it wasn't. In the

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beginning it was often, yes, but then as time went by I still did it from time to time.

Q. Now, you indicated that you had the permission of Miss Baylis to take the records.

A. Baylis.

Q. A few months ago?

A. Yes.

Q. Did you ever——

A. Excuse me. I didn't say—I said I told her I would be over, I was coming over.

Q. And what did you do?

A. And I went over and got them. But I didn't say "May I?"

I said I am coming over because I felt they were ours.

Q. Did you tell Mr. Kolsby you were considering taking the records?

A. Yes.

Q. You told him that?

A. Well, he wasn't there but then I told him after that, and he was there once when I was taking them, yes.

Q. Well, did you ever tell Mr. Kolsby that you were taking them?

A. Yes.

Q. You told him that verbally?

A. In person.

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Q. In person?

A. Yes.

Q. You told him verbally in person that you were taking these records.

Did you tell him that you were not going to bring them back?

A. He didn't ask me.

Q. He didn't ask you?

A. No.

Q. Did you tell Mr. Wolf?

A. I didn't see Mr. Wolf at all.

Q. Now, where did you take the records when you left with them?

A. I took them back to our office.

Q. And who did you give them to?

A. Well, I put them in Mr. Bellis' office.

Q. Put them in his office?

A. Yes. He wasn't there.

Q. And how many trips did you have to make to get the total number of records?

A. I would say four, five. It was over a period of a week or so. There was no hurry about it.

Q. Now, you indicated that there were cases that were still being settled between the partnership of Bellis, Kolsby & Wolf?

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A. Yes.

Q. Are cases still being settled?

A. Yes.

Q. And are some of those cases that are still being settled, contained in the records that you took from Kolsby?

A. I am sorry, I don't understand that.

Q. You indicated that there are still cases pending that haven't been settled; is that correct?

A. Yes.

Q. Now, are some of those cases that are pending contained in the records that you took from Bellis and Kolsby?

A. I don't know; they may be.

Q. You don't know, they may be?

A. They may be.

Q. You have indicated that there was a cash receipts ledger; is that correct?

A. Yes.

Q. Is that where all of the cash receipts were kept?

A. Yes.

Q. Describe the book, the ledger book for us, would you?

A. The first ledger book I had—how could you describe a ledger book? It had many columns and I made an entry of where the money came from in that column, what it was, and then we got a Safeguard method whereby carbons were made.

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You would have a deposit and you would enter it on the card and it would go through, or on the sheet and it would go through to the card and that would be it.

Q. Is that the kind of accounts receivable ledger that you had in 1968 and in 1969, the second one that you described?

A. No. I really don't know. I don't know when we changed our system.

Q. You don't have any idea when you changed your system?

A. I don't know. I really don't know because I kept the other system for such a long period of time, I don't know.

Q. Did you pick up any accounts receivable ledgers when you were over there two months ago?

A. I picked up ledger, I picked up probably, yes.

Q. You don't know what you picked up?

A. I got books for those years so that probably was in there.

Q. What kind of a ledger was that? You don't know?

A. No.

Q. But you think you got the accounts receivable ledger?

A. I think so.

Q. You think you got the accounts receivable ledger but you don't know?

A. No, because I didn't check. That is exactly right.

Q. Once again, what is in those accounts receivable ledgers?

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A. Money that came in.

Q. From whom and for what?

A. From insurance companies with whom we settled cases, and sometimes from retainer clients.

Q. So you are talking about fees for services rendered?

A. Right.

Q. From the partnership?

A. From the partnership?

Q. Yes.

Mr. Lipschitz: There are no fees for services rendered from the partnership.

By Mr. Bergstrom:

Q. Services rendered by the partnership.

Do you understand my question?

A. Services rendered by the partnership?

Q. Yes. Is that what these were coming in for, ma'am?

A. Yes.

Mr. Shmukler: Your Honor, she would like to consult with me.

The Court: You may do so.

(Mr. Shmukler confers with the witness.)

The Witness: Would you clarify that for me?

By Mr. Bergstrom:

Q. You indicated that the accounts receivable ledger was made up of fees that had come in from insurance companies

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and/or retainers?

A. Right.

Q. Are you talking about fees that came in?

A. Not fees, no, we have it wrong. Cases that were settled. An insurance company would send us money for our clients and for ourselves and it wasn't just our fee.

Q. No, I understand that. But the fee was, whatever the fee was and to who it was to go to was based upon the legal representation by Bellis, Kolsby & Wolf?

A. Right.

Mr. Bergstrom: I have nothing further, Your Honor.

The Court: Any redirect?

By Mr. Lipschitz:

Q. Mr. Blumberg also made audits, did he not?

A. Yes, he did.

Mr. Lipschitz: No other questions.

The Court: Gentlemen, I think we should take a short recess. Mr. Comer has been going all day. We will take about a five-minute recess.

(Short recess at 5:15 P. M.)

The Court: I believe everyone has completed the questions they had of this witness, of Mrs. Lipman.

Any other questions of Mrs. Lipman?

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Mr. Bergstrom: I have none, sir.

Mr. Lipschitz: No other questions.

The Court: You are excused.

The Court: Do you wish to call any other witnesses at this time?

Mr. Lipschitz: No, if Your Honor please.

The Court: Do you wish to call any witnesses?

Mr. Bergstrom: No, sir, we do not wish to call any witnesses.

What I would ask the Court to do, in line with the Court's feelings yesterday, I would request that the Court permit me to make a motion to once again break the seal on certain Grand Jury testimony which would lend certain facts to this situation. Specifically I am talking about the Grand Jury testimony of Mr. Herbert Kolsby. I have that Grand Jury testimony here with me today. It is not lengthy, and I would ask the Court under Rule 6(e) to consider a motion to break that secrecy so the Court can be presented with the facts that were developed during that particular Grand Jury session.

The Court: What is your position?

Mr. Lipschitz: If Your Honor please, first, we think we ought to have a copy of that testimony. Of course,

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Your Honor——

The Court: That can't be done.

Mr. Lipschitz: I am thinking it would deprive us of our constitutional rights if Your Honor would consider testimony presented in the Grand Jury in the absence of the defendant.

We have not had any opportunity first to see it to examine it, and if Your Honor is going to rely on any phase of it, we ought to be given an opportunity to rebut it, if necessary. And I think Mr. Kolsby ought to be called because this lady also appeared before the Grand Jury, and the Government made——

The Court: Mr. Lipschitz, you need make no further argument. I agree with you. I see no reason why Mr. Kolsby, if he is to be a witness, can't be called. He apparently, as far as I know, is available and resides here in the city. He may then be subject to cross-examination.

So if the Government wishes to have him as a witness to present any testimony through him, it seems to me that he should be called as a witness.

In addition to that, as I have indicated before, I am most reluctant to allow any of the proceedings before a Grand Jury, except where there is the utmost necessity, as I think there was to get the procedure straightened out in this case, to permit that portion of the Grand Jury

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proceedings in which Mr. Bellis was called before them. So I will deny that motion.

Mr. Bergstrom: May we have a moment, sir?

The Court: Surely.

(Government counsel confer.)

Mr. Bergstrom: Your Honor, the Government sees no need at this time to call Mr. Kolsby. We are prepared to argue the case.

The Court: All right, I will hear you, sir.

Mr. Bergstrom: I think it is their motion and it is their burden so I would assume——

The Court: It is the motion of Mr. Bellis to quash the subpoena, however, it is the Government's motion, as I understand it, to compel him to produce the books and records, so there are two motions outstanding.

Mr. Bergstrom: I am prepared to argue, Your Honor.

The Court: All right, sir.

Mr. Bergstrom: Your Honor, the central issue in this particular case is whether or not the records in question have a privilege. We must distinguish between the privilege that is afforded to records and the privilege that is afforded to individuals, persons.

It is the Government's position that these

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records have no privilege and that therefore they must be produced regardless of the fact that what may be contained therein could possibly incriminate Mr. Bellis. And it is that privilege, privilege as it pertains to the records, that transcends all other

privileges that may exist here because if the Court should find that these records have no privilege, then the Court can, can compel their production regardless of the fact that certain things in them may themselves be incriminating.

Now, to arrive at whether or not the records have a privilege, we must look at a long line of cases.

The cases that have upheld the right to subpoena partnership records, and cited in the Government's brief, follow that line of cases developed from Boyd on. And the principle announced in Boyd, and the principle announced in White, and the principle announced in Wilson and the principle announced in Rogers all seems to be clear that the records must be producible, and that the records themselves have no privilege. Partnership records are treated in an identical manner as corporate records under certain circumstances.

The circumstances of this case which would dictate quite clearly that the partnership records should be treated as corporate records, or which would indicate that these partnership records have no privilege, is

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justified by two facts.

First of all, Mr. Bellis is no longer a partner in that particular law firm. His partnership has since dissolved sometime in the latter part of 1969, so he has no interest from that date on in the partnership regardless of the fact that there may have been fees still being split due to work that was generated while the partnership existed. But, however, from that

particular point on, whether it was September or whether it was November, or whether it was even January 1st of 1970, from that point in time on the business of Kolsby and Wolf continued without the partner Bellis, and he had therefore no interest in that ongoing partnership.

So from that particular point in time he was not a partner, and he is no longer a partner.

When he left that partnership, and when he left those books and records with that partnership, it is the Government's contention, although not cited in the Government's brief, but it is the Government's contention that at that point in time it would appear to me that Mr. Bellis abandoned those books and records. Certainly, he had access to them as the secretary indicated, and then she would check them periodically and go get them periodically, but for the bulk of those particular books and records it would appear that they have been abandoned and

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they were not taken until three years, some three and a half years after the dissolution of the partnership.

Now, with Mr. Bellis no longer being a partner in that partnership his holding those partnership records is in violation of a superior right which exists in the ongoing partnership of Kolsby and Wolf.

And the Third Circuit case of the United States vs. Egenberg would seem to be clear on the fact that the person, the individual or the body who has the superior proprietary or possessory interest has the superior right, and that a claim cannot be invoked by a person with an inferior right.

In addition, in determining whether or not the partnership records have a privilege in themselves, the Court must look, as the cases indicate, to whether or not the records ever had an expectation of privacy, whether in fact they are personal, whether in fact they are private records or whether they are impersonal business entries, as it seems clear the bulk of those records are.

From the testimony of Mr. Bellis' witness, Mrs. Lipman, it would seem apparently clear that a number of people had access to those records, including the accountant, and that those records were used primarily by that accountant to prepare various tax returns.

It would seem to me that at the time those

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records were made there was never any expectation of privacy in those records; they were not the personal or private records of any one individual. They were records of an on-going law partnership. And the records were maintained because the law required them to maintain records because tax returns had to be filed, both for the persons and for the partnership.

These are records that never had an expectation of privacy, and certainly the facts of the case support the fact they did not have privacy. They were accessible by three, four, five, six people, including an accountant, and the records themselves were used to prepare federal income tax returns.

So it would appear to me that on the two grounds that we have to look to to determine whether or not these records have a privilege, it would seem perfectly

clear that the records themselves have no privilege because there was never an expectation of privacy in regard to those particular records, and because Mr. Bellis himself is no longer a partner, and he does not have a superior right to those records over the existing partnership.

Because of that, because of the cases cited by the Government in their brief, and particularly the Egenberg decision, and particularly the Couch decision, we would strongly urge this Court to compel Mr. Bellis to comply

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with the provisions of the Grand Jury subpoena and turn over those books and records that were requested.

In addition, it would seem clear to me that there has been no burden met on the part of the defendant—on the part of Mr. Bellis, excuse me, the witness; he has not met his burden to show that the records themselves have a privilege. He has not been able to show that he has the superior proprietary right or the superior possessory right to those records, and he has not been able to show that those records were strictly personal, private records, maintained by him and with an expectation of privacy; and without showing that, Your Honor, he has not met his burden, and the case law I feel is clear on that.

The Court: Thank you, Mr. Bergstrom.

Mr. Lipschitz: Will Your Honor hear me?

The Court: Yes, sir.

Mr. Lipschitz: If Your Honor please, when Mr. Bergstrom speaks of the superior right to the records,

superior to whom? Is it superior to the Government or superior to the other partners? And that superior right is intertwined with his assertion that the books were abandoned.

These books were never abandoned, if Your Honor please. We never gave up our rights to the books.

Who did we give the rights up to? The other men who were in the firm?

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If Mr. Bergstrom's argument is to bear any weight, if Your Honor please, then a partner could never after dissolution of a partnership, he could never enforce his rights to look at those books because they were abandoned.

This is Mr. Bergstrom's theory of the case.

Privacy has nothing to do with this.

Do we have to put up a sign: These records are private records, in order to retain our right of privacy? Is this what Mr. Bergstrom means?

He speaks of the law required records to be kept. If Mr. Bergstrom's argument is to carry any weight, if Your Honor please, then there wouldn't be any records at all where a person could consider them to be private.

At what point the records required to be kept by law, according to Mr. Bergstrom, can they ever become private? They can't. And you can't force a man to bring in his records.

The only problem here arises from this evidence is the fact that there was a partnership, three men owned records, the man, who according to the evidence, which is undisputed at this point, who had the largest interest,

has the records, assuming that the claim is correct or Mr. Bergstrom's argument is correct.

The Court: Do you think it makes any difference whether there are three partners or three

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hundred partners?

Mr. Lipschitz: If this enterprise or this operation, if this law practice had a firm the size of Wolf, Block, Schorr & Solis-Cohen——

The Court: Three hundred I said.

Mr. Lipschitz: Three hundred—it wouldn't make a bit of difference, if Your Honor please.

The only difference that could arise if they become a professional association. That may change the effect of the partnership.

The Court: Then you are arguing in effect the partnership records could never be subpoenaed from any of the partners?

Mr. Lipschitz: Cannot be subpoenaed from the individual unless this is a tremendous enterprise, and there is nothing personal about their relationship between the partners and the records, and clearly there is.

I can't see, if Your Honor please, where you have to assume that these records are to be treated the same as corporate records. In the case of corporate records they don't belong to the individuals, they belong to an artificial entity, and the officers who appear are the agents of the entity. They don't belong to those individuals, they are stockholders, they may be stock-

holders, they may be officers, but the records belong to the corporation.

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This isn't the situation where you have a small partnership, as you have here. And there isn't any doubt that Mr. Bellis has an interest, has an interest even now in what is the dissolved partnership, and he has an interest in the records.

The Court: I don't understand the Government to contend that he has no interest in the records at all, no interest to look at them. Maybe I misconceive——

Mr. Lipschitz: If I may quote, "He is no longer a partner in that firm and therefore he has no interest in that firm."

This is what Mr. Bergstrom said.

In what capacity does he hold him? I don't think Mr. Bergstrom can contend that these are records which were stolen from the original firm. That can't be.

They are Mr. Bellis' records perhaps as much as the others. The others, there is no evidence before Your Honor that the others had even made a request for the return of those records. There is nothing before you to make even that determination or base any determination on that proposition, or on that assumption.

True, we left the books there because we just didn't take them with us. And I think the lady who testified said that they didn't have enough room to take them and as time went on we took the records.

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We say to Your Honor that even in the cases that have been decided, that are referred to by Mr. Bergstrom, they do not support that view, and there they had said, the issue is whether or not the possession is in an agency capacity or otherwise. They also said in that case dealing with a personal nature of a privilege, and we have been unable to perceive that the seizure of a man's private books and records to be used in evidence against him are substantially different from compelling him to be a witness against himself.

And this is what the Government is trying to effect in this case.

Mr. Sarner: Your Honor, may I just add one point with your permission?

The Court: You may, Mr. Sarner, of course.

Mr. Sarner: I just want to meet the Government's argument of privacy, which is completely misplaced, Your Honor. No one ever equated the privilege against self-incrimination to privacy.

If I go out and shout I committed this murder and I committed that murder to 50 people, I don't have to get on the stand and say I committed it. I can always assert my privilege.

What they are doing, Your Honor, is taking the

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privacy dealing with the attorney-client privilege, and that is why the books and records problem gets so mixed up because you always have usually two situa-

tions; you have the books and records not in the hands of the owner, that is the problem, they are always in the hands of the accountant or the attorney and then the Government comes in and says, well, these weren't private and therefore you don't have your confidentiality privilege applying.

But no one ever suggested that privacy applies to privilege against self-incrimination.

I can disclose——

The Court: But the cases do indicate, don't they, that where, for instance, as given to the tax accountant, they are thereby subpoena I believe, they do discuss the question of the privacy, that they weren't intended to remain the personal private property of the taxpayer.

Mr. Sarner: But the disclosure, we are talking about disclosure, is something submitted in confidence. The whole point is disclosure. If someone tells an attorney something in confidence that's free from disclosure.

The Court: Right, of course.

Mr. Sarner: If he gives books and records to the attorney which he wants the attorney to submit to the SEC, that is given for purposes of disclosure; it has nothing to do with self-incrimination, not a thing to do with it.

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Privacy has nothing to do with it. It's such a cardinal rule. Because I can disclose 10, 15 people that I did this, I can write in my books that I did all these things,

everybody can see them, and yet the Government cannot compel me to deliver them.

And the Boyd case, Your Honor, I mean the Boyd case, Egenbert, the famous case which Mr. Lipschitz was reading to you, says specifically that the books and records of an individual are the same as his testimony. And if you take the Government's view there would never be a situation where you had any books and records for tax purposes subject to the privilege against self-incrimination. It is just not the law. And they have made no showing whatsoever.

We have the burden. We show that we have books and records, we show that we have a small partnership, and we show that they are under the view here in the ownership and possession of Mr. Bellis, at least in his office. It was shown that much.

They haven't even come forward with any suggestions that this is not with the complete consent and authorization of the other partners. Nothing has been adduced. You must find that that is so. They waived their right to proceed.

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They didn't introduce the Grand Jury testimony. Well, they didn't introduce Mr. Kolsby who could have refuted it. He was available. And the Government can't play hot and cold that way.

The Court: Thank you, Mr. Sarner.

Gentlemen, this is a matter, as I see it, that should require prompt decision.

There has been a case decided by Judge Blair of the District of Maryland, Civil Action No. 72-292B,

decided on April 23, 1973, I believe. It has not yet been reported in Federal Supplement. It will be reported in Federal Supplement. That case involved a law partnership of four partners.

It is true that so far as I read this case, it does not indicate that it had dissolved but Judge Blair discusses at some length the question of dissolution of corporations as contained in the various cases, and in this opinion he concludes that the size of the partnership is not the crucial test.

I, without going into any detail, accept and adopt the reasoning of Judge Blair. He concedes that there are differences of opinion or splits of authority, if you will, the Southern District of New York apparently having decided some cases that would seem to indicate to the contrary, but he concludes that they are subject, law partnership

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records are subject to subpoena. And I agree with that decision.

I will therefore in substance direct that the records be turned over. However, as disclosed by the testimony, it would appear to me that perhaps the subpoena as presently worded might be overly broad.

Mr. Bergstrom: Your Honor, at this time the Government is willing to narrow the limits of that particular subpoena.

The Court: Let me suggest that in view of the testimony that was given, it seems to me that there may be certain partnership records in the possession of Mr. Bellis that include what I would refer to as individual client files, and we get into a very delicate ques-

tion of attorney-client privilege there, and I would not direct that those be turned over.

So far as the cash receipt books, cash disbursement books, or any books and records showing the financial situation of the partnership, it seems to me are records of the partnership, they are under the partnership law of Pennsylvania subject to any agreements between the partners to be kept at the principal place of the partnership and every partner shall at all times have access to and may inspect and copy any of them and, therefore, it

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seems to me, they are not the personal records of any one particular partner; and if they are found in the possession of one partner it seems to me they are subject to subpoena and investigation by a Grand Jury.

Therefore, I will make the following order: That it is directed that Isadore Bellis comply with the subpoena that was issued by the Grand Jury directing him to turn over all partnership records currently in his possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969, limited, however, that any individual client files containing any advice or confidential relationships between the attorney and attorney and client are not to be divulged, but he shall turn over any cash receipt books, cash disbursement books or books of records and accounts of the partnership for the years in question.

It seems to me that there should be given some reasonable time within which Mr. Bellis may comply with this before we would proceed with any contempt proceeding. On the other hand, I will state at this time that I will be most reluctant to issue a contempt cita-

tion which would include possibly jailing the person found to be in violation of the order or being in contempt of court, without giving an adequate opportunity to appeal this because it certainly is a matter that, as I see it, has never been clearly decided by the United States Supreme Court nor by the

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Third Circuit Court of Appeals.

Whether this order that I have just now made is presently appealable, I am not in a position to say but I want to afford full opportunity for appeal to be taken in this matter.

Mr. Sarner: Your Honor, may I address myself to this last problem because I had this in a case and Mr. Vaira is familiar and Your Honor is familiar also, the Jaskiewicz case, which is involved in another matter.

The Court: There the Government decided they would appeal.

Mr. Sarner: No. This is prior to the time that the matter was referred to Your Honor.

I tried to prevent the accountant for Mr. Jaskiewicz from testifying before the Grand Jury. Judge Van Dusen, who was then on the District Court, ordered him to testify. I argued that it was in violation of the accountant-client privilege and the Pennsylvania law, and with the tacit agreement with the United States Attorney we took the appeal to the Court of Appeals, briefed it and argued it and unfortunately the Court of Appeals decided they had no jurisdiction unless there was a contempt determination. So that it had to go back for that purpose.

I would like Your Honor to direct Mr. Bellis

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to produce the records, he refuses, and hold him in contempt and stay——

Mr. Lipschitz: Will Your Honor give me an opportunity to speak to counsel?

Mr. Vaira: There are cases in the Seventh Circuit in re Dionisio which went to the Supreme Court on the very same issue. I think there was a discussion that the contempt citation is which is appealable.

(Mr. Bellis confers with his counsel.)

Mr. Lipschitz: Would Your Honor give us a little time—I would be reluctant if I were Mr. Bellis to be held in contempt for anything—perhaps I deserve it on occasions. But what we would like to find out, and I haven't done any research on it, is whether or not there is any kind of an appealable order other than the final order which would declare Mr. Bellis as being contumacious.

I know there are certain circumstances, beginning with the DiBella case, which was decided some years ago, where the Court may certify a matter for appeal even though normally it would be considered to be interlocutory.

I think this matter which Your Honor is about to dispose of or may have disposed of has great importance. I think it will arise, I know one other instance where it arose, and the Government apparently abandoned its position,

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and this happened very recently. It may arise again.

I think it would be of interest to all concerned to

have this matter adjudicated without the harm that will ensue to a person who is trying to have a final determination made of the matter. If Your Honor would give us one or two days so that we could do a little research, and I think we have all been under pressure trying to get all of the law together for Your Honor.

The Court: I completely agree with that statement. It seems to me that perhaps at this point I could direct that the books and records which I have directed should be turned over, should be turned over no later than a given date, next week, and that will certainly afford an adequate opportunity; in other words, that I would not find him under any circumstances in contempt of court prior to that.

May I ask Government counsel how urgent the matter is so far as this Grand Jury is concerned. They will remain in session for a considerable period of time, will they not?

Mr. Bergstrom: It seems to me, Your Honor, they are only going to be sitting for another two months so if we could have the order to direct Mr. Bellis to produce the records to the Grand Jury either on next Wednesday or the following Wednesday, preferably next

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Wednesday——

The Court: Frankly, that is exactly what I had in mind because I think that would give counsel an opportunity to determine what procedurally may be done.

Mr. Lipschitz: I would perfer the week after that because it is in the interest of the Government because

Mr. Bergstrom said the other day I think that they were quite crowded and they couldn't have anything else, they were all tied up the next week, so perhaps it would be more convenient for him to make it a week from next Wednesday.

Am I quoting you correctly?

Mr. Vaira: I cancelled an hour of Grand Jury next week; it's available.

Mr. Lipschitz: I don't want to pressure you.

Mr. Bergstrom: That would be four or five days to research it. He just said he only needed a day or two.

The Court: The order which I have just made in Miscellaneous No. 71-295, directing that certain records be turned over by Mr. Bellis to the Grand Jury in response to the subpoena which it issued, I will direct that they be turned over to the Grand Jury on or before

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12:00 o'clock noon, May 16, 1973.

Mr. Bergstrom: There is one other point. Your order excepts all those records which may be in violation, which may violate the attorney-client privilege. If the Government could produce a waiver of any attorney-client privilege would Your Honor be disposed to modify that order as to that particular client? In other words, if the Government were to produce a client who waived any privilege would the Court be disposed to modify the order as it pertained to that client only?

The Court: You are asking me to give you an ex parte declaratory preliminary advisory opinion, which

I will not do. Of course, I would entertain a motion. I think that if there is a waiver, certainly, an express waiver, that might raise different issues and different questions.

I mentioned that subpoena as having been issued in Miscellaneous No. 71-295, which is the number that appears on the subpoena. I am not sure why that number would appear. Normally it should be 73-something.

Mr. Vaira: Your Honor, if it was on there, that is incorrect. I meant to go to the Clerk's office and get a new Miscellaneous number yesterday but I didn't want to do it until we got in and filed that document. I don't know what the Court would do with it.

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I think that I should go down to the Clerk and get a new Miscellaneous number for this particular proceeding here.

I think that is an incorrect number.

The Court: That is a matter for the Government to decide, how it should proceed in that matter.

Also, of course, this matter came to me as emergency judge as a special matter, but I take it that under our rules anything further that comes up on this matter would remain with me. It would seem to me appropriate that it should be.

Mr. Vaira: I will get a Miscellaneous number and communicate it to your clerks.

Mr. Lipschitz: One other request, Your Honor. Could we have a copy of that opinion? It won't get over to us for probably a month or two.

The Court: Yes. This is a matter that just came to our attention, I guess today, and we were able to or we heard about it the other day and telephoned, and we just received a copy of it today.

I will have Xerox copies made of it, I guess the machine is closed at the present time, and will deliver to counsel.

Mr. Lipschitz: We can pick them up if we get a call from your chambers.

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The Court: We will have them for you tomorrow, gentlemen.

Anything further at this time?

(No response.)

We will recess.

(Concluded at 6:00 o'clock P. M.)

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[1]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES GRAND JURY
Wednesday, May 16, 1973

Proceedings taken before the United States Grand Jury, in the Grand Jury Room, Room 12, United States Courthouse, Philadelphia, Pennsylvania, on Wednesday, May 16, 1973, beginning at 1:10 o'clock p.m.

APPEARANCES: THOMAS BERGSTROM, ESQ.

Representing the United States
Department of Justice

TESTIMONY OF ISADORE BELLIS

The Grand Jury Foreman: You do swear that the evidence you shall give to the Grand Inquest in the matter now pending shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Isadore Bellis: I do.

ISADORE BELLIS, having been

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duly sworn, was examined and testified as follows:

EXAMINATION.

By Mr. Bergstrom:

Q. Please be seated, sir. For the record please state your name.

A. Isadore Bellis.

Q. Mr. Bellis, for the record are you the same Isadore Bellis that appeared before this Grand Jury last Wednesday, which would have been May 9 at a different location, and appearing before that Grand Jury pursuant to a subpoena of this Grand Jury issued to you directing you to appear before the Grand Jury and bring certain partnership records of the partnership of Bellis, Kolsby and Wolf for the years 1968 and 1969?

A. I am the same Mr. Bellis that appeared here on May 9 and pursuant to the subpoena.

Q. Now, subsequent to that appearance, Mr. Bellis, were you present in Courtroom Number 15 wherein Judge Van Artsdalen ordered you to provide those particular records to this Grand Jury, sir?

A. Yes.

Q. Were you present?

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A. Yes, I was.

Q. And did you hear that order?

A. Yes, I did.

Q. Now, Mr. Bellis, did you bring those records with you today, sir?

A. I did not on the grounds that under the Constitution of the United States, particularly but not limited to the First, Fourth, Fifth, Sixth, and Fourteenth amendments, and the Constitution and laws of Pennsylvania, I can not be compelled to be a witness against myself or give

evidence against myself, and the books and records may contain certain private testimonial and personal statements and information which might be considered as so doing.

All of which Counsel has advised me and on which advice I rely, give me the right to refuse production of the records and books you referred to or answering any questions in connection with them.

Upon advice of Counsel on which advice I rely, I also refuse because of obligations imposed upon me by virtue of an attorney-client relationship.

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Q. Now, are you represented, Mr. Bellis, by Louis Lipschitz?

A. Yes.

Q. And when you indicate that you are acting on the advice of Counsel, are you acting on the advice of Mr. Lipschitz?

A. Mr. Lipschitz and Mr. Sarner.

Q. Then, as I understand it, sir, you are not going to produce these records to this Grand Jury as ordered by Judge Van Artsdalen as based upon the advice of Mr. Lipschitz and Mr. Sarner?

A. My statements previously made I do represent, and that statement includes that my action is based on the advice of Counsel.

Q. All right, now we have an appointment to see Judge Van Artsdalen in regard to this at 1:20 so I'm going to direct you on behalf of the Grand Jury to appear in Courtroom Number 15 at 1:20 p.m.

(The witness was dismissed.)

(The Grand Jury was dismissed for lunch at 1:15 o'clock p.m.)

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This is to certify that the attached proceedings before the United States Grand Jury, in the Grand Jury Room, Room 12, United States Courthouse, Philadelphia, Pennsylvania, on Wednesday, May 16, 1973, was held as herein appears, and that this is the original transcript thereof for the file of the Department.

ALFRED W. KERSHAW,
Court Reporter.

Reported By:

Alfred W. Kershaw

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Miscellaneous
No. 73-95.

IN RE:

GRAND JURY INVESTIGATION
ISADORE H. BELLIS, A WITNESS.

Philadelphia, Pa., May 16, 1973.
Before HON. DONALD W. VAN ARTSDALEN, *J.*

APPEARANCES:

THOMAS A. BERGSTROM, ESQ.,
Special Attorney,
United States Department of Justice,
for the Government

LOUIS LIPSCHITZ, ESQ.,
915 Robinson Building,
Philadelphia, Pennsylvania,
for Isadore H. Bellis.

Jacob J. Comer
Official Court Reporter
Room 3054—U. S. Courthouse
Philadelphia, Pa. 19107
WAlnut 5-9480

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The Court: Good afternoon, gentlemen.

Mr. Lipschitz: If Your Honor please, Mr. Bellis appeared before the Grand Jury this afternoon and on advice of counsel refused to produce any records which were chargeable to him.

The Court: Does the U. S. Attorney have any application in view of that?

Mr. Bergstrom: The application of the Government, sir, is an oral application which we would like to make at this time for an order of contempt under the provisions of Title 28, United States Code, Section 1826. As I read that section it is appropriate and applicable to a situation as this. I think it is a controlling provision, a statutory provision, which authorizes the Court to find the witness in contempt of the Grand Jury and sentence him appropriately.

Mr. Lipschitz: We submit that our refusal is based on constitutional grounds and under those circumstances Your Honor should not enter an order of contempt against Mr. Bellis. Mr. Bellis has claimed his rights under the Constitution of Pennsylvania and the United States Constitution not to produce these records.

The Court: I have of course previously ruled, as you know, that there is no privilege in this instance to refuse to comply with the subpoena duces tecum

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and made an order from the bench that Mr. Bellis comply with the terms of the subpoena on or before noon of this date.

I am filing this date also a further memorandum opinion setting forth more fully my reasons for entering that order. I believe a copy has been handed to counsel, although I don't believe the opinion has actually been filed, it will be filed today.

Also I would note that counsel did meet with me in chambers in an attempt, on the part of counsel for Mr. Bellis, to persuade me that that order in and of itself might be appealable under 28 United States Code, Section 1292(b) without the necessity of Mr. Bellis refusing to comply with the order and being held in contempt of court.

I have concluded that that could not be done and so advised counsel, and I am also filing a memorandum and order in that regard which is dated yesterday although again it was just filed this morning.

And in regard to that particular decision I want to add on record the case of the United States vs. Ryan: 402 U. S. 530, decided by the Supreme Court of the United States on May 24, 1971, which I think clearly indicates that in this type of situation the only way in which the ruling which I have made may be properly appealed is by refusing to comply with the order, being held in contempt of court and then taking the appeal from there.

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For that reason it is entirely understandable to me the reasons for Mr. Bellis, on advice of counsel, refusing to comply with the terms of the order in order that it may be appealed and reviewed on appeal.

It does seem to me that the questions involved here are certainly sufficiently uncertain as to make an appeal appropriate in this case, and that it would be helpful to the District Court in the future to have appellate review of this decision for its future guidance.

Therefore, it seems to me that in view of the rulings I have heretofore made, and the present situation, that Mr. Bellis is in contempt of court, and I do find that he is in civil contempt of court and I will summarily order confinement at a suitable place until such time as the witness is ready to give such testimony or rather to produce the books required under the subpoena duces tecum, or for the term of the Grand Jury, including extensions thereof, whichever shall first occur. In no event, however, shall the confinement exceed 18 months.

I will say further that, as I understand the law, it is appropriate, and counsel intend to appeal this order, and that under the law Mr. Bellis is entitled to bail unless there is a determination that the appeal is frivolous or taken for delay, which clearly it is not in this case, and, therefore, I will hear any application

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for bail.

Mr. Lipschitz: If Your Honor please, I wish to submit an application for stay of execution and release pending the appeal.

(Document handed to the Court.)

Mr. Lipschitz: May the record note that I was authorized to sign Mr. Sarner's name to the application, if Your Honor please. Mr. Sarner is out of town.

The Court: Do you have a copy of this?

Mr. Bergstrom: Yes, sir. I just received it.

The Court: And what is your position?

Mr. Bergstrom: I have no objection, Your Honor.

The Court: Then we will stay the execution of the judgment and sentence of contempt that has been entered

today. Mr. Bellis, the witness, will be released upon signing his own recognizance pending the taking of an appeal and decision on the appeal.

Mr. Lipschitz: Will Your Honor's set an amount for recognizance?

The Court: It may be in a nominal amount.

I take it the Government has no feeling about that?

Mr. Bergstrom: No, sir.

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The Court: We will set the amount in the sum of $100 but he may sign his own recognizance so that no security will be required.

Mr. Lipschitz: Thank you, sir.

May I take him down to the Clerk's office to sign?

The Court: Yes.

Is there a Marshal here?

(No response.)

I had asked the Marshal to come but you may go down there.

Mr. Lipschitz: All right, sir.

The Court: Anything further, gentlemen?

Mr. Bergstrom: No, sir.

Mr. Lipschitz: No, sir.

The Court: We will take a recess.

(Adjourned at 1:40 P. M.)

Reported by
Jacob J. Comer

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MISC. NO. .

IN RE: GRAND JURY INVESTIGATION
ISADORE H. BELLIS, a witness

NOTICE OF APPEAL.

Notice is given that Isadore H. Bellis, the above named witness, hereby appeals to the United States Court of Appeals for the Third Circuit from the judgment and sentence of contempt entered in this action on the 16th day of May, 1973.

LEONARD SARNER,
LOUIS LIPSCHITZ,
915 Robinson Bldg.,
Phila. Pa. 19102
Attorney for Isadore H. Bellis.